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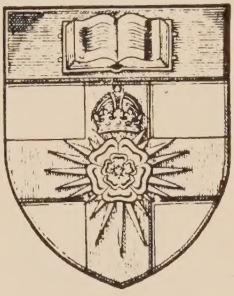

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IN IRELAND,

AND

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REPORTERS.

Court of Appeal,	Robert D. Murray, G. Y. Dixon,	Barristers-at-law.
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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Aaron's Reefs (Limited) *v.* Twiss, 242
Arbuckle *v.* Buchanan, 339
Archer, Tenant; Caledon (Earl of), Landlord, 473

B.

Bailey and Moore, Northern Banking Co. *v.* 18
Beaufort *v.* Ledwith, 16
Beggan, Kirkpatrick *v.* 451
Birch, *Ex parte*; *In re* Housing of the Working Classes Act, 1890, 181
Brew and Glynn, Tenants; Stackpoole, Landlord, 193
Brown *v.* Buchanan, 318
——, *In re*, 363
Brown's Case (M'Grorey *v.* Chambers), 129
Buchanan, Arbuckle *v.* 339
————, Brown *v.* 318
————, Gormley *v.* 299
————, M'Keever *v.* 312
———— and Torish, Thompson *v.* 365

C.

Caledon (Earl of), Landlord; Archer, Tenant, 473

PAGE

Callaghan, Lovell *v.* (*In re* Cork Burgess Roll), 346
Casey, Grantee; Hamilton, Grantor, 224
Chambers, Holland *v.* (Devine's Case), 442
————, ———— *v.* (John Doherty's Case), 285
————, M'Grorey *v.* (Brown's Case), 129
————, Mooney *v.* 374
Clare Co. (Secretary of Grand Jury of), Reg. (West Clare Railway Co.) *v.* 691
Clements, Tenant; Tighe, Landlord, 101
Colfer, New Ross Union (Guardians of) *to* 118
Conner *v.* Lyons, 24
Conroy, Tenant; Drogheda (Marquis of), Landlord, 590
Corballis (Trustee of), Landlord; Ward, Tenant, 637
Cork Burgess Roll, *In re* (Lovell *v.* Callaghan), 346
Cullen, National Bank *v.* 683
Cumming *v.* Great Northern, Manchester, Sheffield, and Lincolnshire Joint Railways, 208, 223

D.

PAGE

Devine's Case (Holland *v.* Chambers), 442
Doherty's Case (Holland *v.* Chambers) 285
Downshire (Marquis of) Landlord; M'Cann, Tenant, 611
Drogheda (Marquis of) Landlord; Conroy, Tenant, 590
Drury, Reg. (Bridgeman) *v.* 489
Dublin County (Justices of), Reg. (Ellis) *v.* 527

E.

Egan, Johnson *v.* 480

F.

Farley, Landlord; Perry, Tenant, 579
Farrelly, Respondent; Marquis of Headfort, Appellant, 12
Fitzgerald, Landlord; Walsh, Tenant, 731

G.

Garnett, Tenant; Garnett, Landlord, 41
Gloster *v.* Murphy, 49
Gorman, Tenant; King-Harman, Landlord, 238
Gormanstown (Viscount), Landlord; Pratt, Tenant, 279, 557
Gormley *v.* Buchanan, 299
Graham, Holland *v.* 434
Great Northern, Manchester, Sheffield, and Lincolnshire Joint Railways, Cumming *v.* 208, 223
Greville *v.* Hayes, 20

H.

PAGE

Hamilton, Grantor; Casey, Grantee, 224
Harbison *v.* M'Larnon, 682
Hayes, Greville *v.* 20
——, Spencer *v.* 14
Headfort (Marquis of), Appellant; Farrelly, Respondent, 12
Helliwell, Hilton *v.* 94
Henderson, Torish *v.* 155
Hilton *v.* Helliwell, 94
Hodgens *v.* Keon, 657, 662
Holland *v.* Chambers (Devine's Case), 442
——— *v.* ——— (John Doherty's Case), 285
——— *v.* Graham, 434
Housing of the Working Classes Act, 1890; *Ex parte* Birch, 181
Huggard, Tenant; West, Landlord, 108

I.

Irish Land Commission, Reg. (Lord Rossmore) *v.* 394

J.

Johnson *v.* Egan, 480

K.

Kelly, Respondent; M'Gann, Appellant, 8
Keon, Hodgens *v.* 657, 662
Kieran, Grantee; Mollan, Grantor, 27
King, Ronan *v.* 61, 648
King-Harman, Landlord, Gorman, Tenant, 238
Kirkpatrick *v.* Beggan, 451

L.

Ledwith, Beaufort *v.* 16

PAGE

Loftus, Landlord; M'Cormick, Tenant, 465
Londonderry Port and Harbour Commissioners, Appellants; Londonderry Bridge Commissioners, Respondents, 384
Love, Torish *v.* 372
Lovell *v.* Callaghan (*In re* Cork Burgess Roll), 346
Lyons, Conner *v.* 24

M.

M'Auliffe, Reg. (Alton) *v.* 127
M'Bride *v.* M'Bride, 76
M'Cann, Tenant; Downshire (Marquis of), Landlord, 611
M'Clelland, M'Kibbin, and Cordukes *v.* 654
M'Cormack *v.* Ross, 545
M'Cormick, Tenant; Loftus, Landlord, 465
M'Gann, Appellant; Kelly, Respondent, 8
M'Grath, Respondent; M'Hugh, Appellant, 78
M'Grorey *v.* Chambers (Brown's Case), 129
M'Hugh, Appellant; M'Grath, Respondent, 78
M'Keever *v.* Buchanan, 312
M'Kibbin and Cordukes *v.* M'Clelland, 654
M'Larnon, Harbison *v.* 682
Maconchy *v.* Trower, 663
Mayo Presentments; *In re* Murphy, 199
Mitchell *v.* Smyth, 351
Mollan, Grantor; Kieran Grantee, 27
Molony *v.* Molony, 1
Mooney *v.* Chambers, 374
Murphy, Gloster *v.* 49
———, *In re;* Mayo Presentments, 199

PAGE

Murray, Tenant; Scottish Provident Institution, Landlords, 44

N.

National Bank *v.* Cullen, 683
New Ross Union (Guardians of) *to* Colfer, 118
Northern Banking Co. *v.* Bailey and Moore, 18
Norwich Union Insurance Co., O'Connor *v.* 723

O.

O'Connor *v.* Norwich Union Insurance Co., 723
Orr and Smith, Torish *v.* 381

P.

Parke *v.* Ulster Bank, Limited, 652
Perry, Tenant; Farley, Landlord, 579
Pratt, Tenant; Gormanstown (Viscount), Landlord, 279, 557

Q.

Quigley, Riddall *v.* 144

R.

Reg. (West Clare Railway Co.) *v.* Clare County (Secretary of Grand Jury of), 691
—— (Bridgeman) *v.* Drury, 489
—— (Ellis) *v.* Dublin County (Justices of), 527
—— (Lord Rossmore) *v.* Irish Land Commission, 394
—— (Alton) *v.* M'Auliffe, 127
—— (Blakeney) *v.* Roscommon (Justices of), 158
—— (Marshall) *v.* Tyrone (Justices of), 246

PAGE

Reg. (Murphy) *v.* Wexford (Justices of), 81
Riddall *v.* Quigley, 144
Ronan *v.* King, 61, 648
Roscommon (Justices of), Reg. (Blakeney) *v.* 158
Ross, M'Cormack *v.* 545

S.

Scottish Provident Institution, Landlords; Murray, Tenant, 44
Smyth, Mitchell *v.* 351
Spencer *v.* Hayes and Co., 14
Stackpoole, Landlord; Brew and Glynn, Tenants, 193

T.

Thompson *v.* Buchanan and Torish, 365
Tighe, Landlord; Clements, Tenant, 101
Torish *v.* Henderson, 155
——— *v.* Love, 372

PAGE

Torish *v.* Orr and Smith, 381
Tralee and Dingle Light Railway Co.; *In re*, 115
Trower, Maconchy *v.* 663
Twiss, Aaron's Reefs, Limited, *v.* 242
Tyrone (Justices of), Reg. (Marshall) *v.* 246

U.

Ulster Bank, Limited, Parke *v.* 652

W.

Walsh, Tenant; Fitzgerald, Landlord, 731
Ward, Tenant; Corballis (Trustee of), Landlord, 637
West, Landlord; Huggard, Tenant, 108
Wexford (Justices of), Reg. (Murphy) *v.* 81
White, Tenant; White, Landlord, 573

PAGE

Holland *v.* Graham, 453, 454, 455, 456, 458, 462
Holroyd *v.* Breare, 547, 548, 552, 553
Hooper *v.* Kenshole, . . 348
Houlden *v.* Smith, . . . 355
Hughes *v.* Barnett, . 133, 134, 138
——— *v.* Patton, . . . 640
Hussey *v.* Holmes, . . . 54

I.

Inchiquin *v.* Lyons, . . 109
Irvine *v.* Osborne, . . . 13

J.

Jackson *v.* Hagan, 590, 592, 593, 595, 598, 599
——— *v.* M'Master, . . 4
——— *v.* Newcastle (Duke of), 399
Jacobs *v.* Monck, . . . 682
Johnson *v.* Meldon, . . 355
Johnston, *Ex parte*, 401, 404, 405
Jones *v.* Beveridge, . . 133

K.

Kavanagh *v.* Glorney, . . 402
Kearney *v.* Ryan, 61, 63, 64, 65, 68, 71, 74, 75, 648, 649, 652
Kelly v. Rattey, . . 224, 226
Kennedy *v.* Essex, 483, 576, 639, 647
Kenworthy v. Queen Insurance Co. 725
Kiernan's Case, . . . 348
Killeen *v.* Lambert, 476, 613, 628, 629, 632
Kilpatrick *v.* Murphy, . . 302
Kingston *v.* O'Neil, . . . 13
Kirkpatrick *v.* Murphy, 300, 305, 320, 333, 343
Knight *v.* Halliwell, . . 402

L.

Lally *v.* Concannon, . . 54
Lambton, *Ex parte*, . . 193
Larkin *v.* Clarke, . . 436, 457
Laverty *v.* Moore, . . . 593
Lawrenson *v.* Hill, . 161, 355
Lees *v.* Raffitt, . 547, 548, 553
Leeson *v.* General Council of Medical Education, 530, 541, 542, 544
Lemere *v.* Elliott, . . . 661
Leonard *v.* Alloways, . 133, 141
——— *v.* M'Cann, 288, 300, 302, 313 320
Lewin *v.* Eagleton, . . 109

PAGE

Listowel *v.* Hewson, . . 562
——— , *In re*, . . . 503
Littleton *v.* M'Namara, . . 482
London Joint Stock Bank *v.* Simmons, ... 220
Londonderry Bridge Commissioners *v.* M'Keever, . 388, 389
Looby *v.* Finch, . . . 104
Lynch *to* Chance, . . . 245
Lyon *v.* Reed, . . . 596

M.

M'Carthy *v.* Swanton, . . 109
M'Donnell *v.* Blake, 590, 592, 593, 595, 596, 598, 599, 600, 603
M'Gann *v.* Kelly, . . . 128
M'Gee v. Buchanan, . 436, 448
——— *v.* Colquhoun, 288, 291, 292, 295, 296, 297, 320, 333, 342
M'Goldrick *v.* Charlton, . . 156
M'Keever *v.* Buchanan, 322, 333, 337
M'Kenna *v.* Pape, . . . 259
M'Loughlin's Case, 288, 291, 320, 331, 332, 336, 344
M'Namara *v.* Malone, . . 121
M'Niffe *v.* M'Tiernan . . 133
Maconchy *v.* Robertson, . 575, 641
Magner *v.* Hawkes, 281, 282, 283, 557, 558, 559, 560, 561, 562, 563, 565, 566, 567, 569, 571, 572
Malton *v.* West, . . . 54
Manvers *v.* Bartholomew, . 86, 92
Markham, *Ex parte*, . . 399
Martin *v.* Great Northern Railway Co. 119
Massy *v.* Norse, . 109, 111, 112
Mathews *v.* Carpenter, . . 402
——— *v.* Magrath, . 133, 134
Mayo (County) Presentments, *In re*, 203, 499, 503, 511, 525
Meade *v.* Cooper, 133, 134, 136, 137, 142
Metropolitan Railway Co. *v.* Wright, ... 310
Metters *v.* Brown, . . . 294
Meux *v.* Jacob, . . . 194
Mitchelstown Union (Guardians of) *v.* Duffy, . . . 530
Moher *v.* O'Grady . . . 75
Montgomery *v.* O'Hara, 435, 592, 593, 595, 598
Moore *v.* Batt, . . . 284
——— *v.* Smith, . . . 11
Mordecai *v.* Nutting, . 547, 551
Morris *v.* Morris. . . . 229
Morrogh *v.* Hall, . . . 55
Moylan *v.* Finch, . . 36, 104, 111
Mulcaire *v.* Joynt, 342, 639, 640, 646

PAGE

Mulhern *v.* Buchanan, . . 157
——— *v.* Dorian, . . 3, 4
Murphy *v.* Daly, . . 468, 469
——— *v.* Sandes, . . . 65
Murtagh *v.* Allen, . . . 482
Muschamp *v.* Lancaster and Preston Railway Co. . . 221
Musgrave *v.* Walsh, . . 17

N.

Nelson *v.* Headford, . . 614
New Ross Union *v.* Byrne, . 118
New Sarum Case, . . . 331
Noah *v.* Owen, . . . 94
Noble *v.* Brady, . . . 28, 30
Norman *v.* Climenson, 547, 549, 553

O.

O'Brien *v.* Fenton, . . . 134
O'Hagan *v.* Colquhoun, . . 287
O'Leary *v.* Douglass, . . 87
O'Malley *v.* Kilmallock Union (Guardians of), . . . 26
O'Neill *v.* Cooper, . . . 28, 31
O'Riordan *v.* Kelly, . . 42
Ormsby *v.* Crean, . . 109, 482

P.

Palmer *v.* Johnson, . . . 64
——— *v.* Power, 49, 53, 54, 55, 56, 58, 59, 60
Pearson *v.* Spencer, . . 264
Pease *v.* Chaytor, . . . 355
Pelton *v.* Harrison, . . . 547
Perrott *v.* Denis, . . 104, 107
Peto *v.* Blades, . . . 65
Phillips' Case, . . . 320
Pickard *v.* Baylis, . . . 133
Pontifex *v.* Foord, . . . 21
Pope *v.* Whalley, . . . 348
Poynton *v.* Smyth, . . . 29
Pringle *v.* Gloag, . . . 547

Q.

Quinton *v.* Frith, . . . 3, 4

R.

Randeggar *v.* Holmes, . 726
Rankin *v.* M'Murtry, . 4, 639, 640
R. *v.* Adamson, 161, 162, 176, 400
— *v.* Aire, ... 86
— *v.* Alcock, ... 531
— *v.* Allan, 530, 532, 535, 541, 542
— *v.* Antrim (Justices of), . 402

PAGE

R. *v.* Bailey, ... 348
— *v.* Bolton, . . . 162, 175
— *v.* Boteler, ... 400
— *v.* Bradlaugh, . . . 162
— *v.* Bridgenorth (Mayor of), . 348
— *v.* Brompton Co. Court (Judge of) 354
— (Smith) *v.* Cavan (Justices of), ... 256, 278
— (Sullivan) *v.* Cork (Justices of), 87
— *v.* Cork (Treasurer of), 115, 116, 117, 708
— *v.* Cottle, ... 635
— *v.* Cummins, . . . 168
— *v.* Deal (Mayor and Justices of), . . . 531, 542, 543
— (M'Evoy) *v.* Dublin (Corporation of), . 494, 496, 520, 522
— (Blessington Steam Tramway Co.) *v.* Dublin (Grand Jury of), ... 713
— (Bentham) *v.* Dublin (Justices of), . 81, 85, 86, 88, 89
— (Clitheroe) *v.* Dublin (Recorder of), . 256, 259, 267, 278
— *v.* Farringdon, . . . 86
— *v.* Flintshire (Justices of), . 87
— *v.* Gaisford, . . 530, 542
— *v.* Great Yarmouth (Justices of), ... 530, 533
— *v.* Handsley, . 530, 531, 534
— *v.* Hopkins, . . . 365
— *v.* Huntingdon (Justices of), 531, 534
— *v.* Kent (Justices of), . . 544
— *v.* Kent (Treasurer of), . 87
— *v.* King's County (Justices of), ... 171
— *v.* Lancashire (Justices of), 260, 272
— *v.* Lediard, . . . 162
— *v.* Lefroy, ... 354
— (Fitzgerald) *v.* Limerick (Justices of), . . . 85, 86, 89
— *v.* London (Bishop of), . 400
— (Orr) *v.* Londonderry (Justices of), ... 162, 163
— *v.* M'Kenzie, . . . 541
— (May) *v.* Mayo (Justices of), 85
— *v.* Meyer, . . 531, 533, 534
— *v.* Middlesex (Justices of), . 171
— *v.* Milledge, . 530, 534, 535
— *v.* Morison, . . . 263
— *v.* Newborough, . 501, 520, 525
— *v.* Omagh (Guardians of), . 518
— *v.* Pembrokeshire (Justices of), 401
— *v.* Pettitmangin, 535, 541, 543
— *v.* Poynder, . . . 348
— *v.* Prest, . . . 512, 522
— *v.* Rand, . . . 531, 541
— (Palmer) *v.* Reilly, . . 13

PAGE
R. v. Richmond (Justices of), . 544
— (Jephson) v. Roscommon (Justices of), . 498, 510, 512
— v. Runciman, . . . 402
— v. St. Giles in the Fields, . 348
— v. St. Mary Kalendar, . 348
— v. South Holland Drainage Committee, ... 501
— v. Staffordshire (Justices of), 276
— v. Suffolk (Justices of), . 402
— v. Sullivan (John), 161, 162, 168, 169, 175, 178
— v. Surrey (Justices of), 499, 503, 511, 520, 525
— v. Sykes, ... 402
— (Kimberley) v. Taunton St. Mary's (Inhabitants of), 502, 507, 519
— (Cust) v. Tipperary (Justices of), ... 85
— v. Trapshaw, . . . 348
— v. Waterhouse, . . . 531
— v. West Riding of Yorkshire (Justices of), . . . 161
— v. Woodlock, . . . 263
Road Contractor *Re* (3 Ir. L. T., 426), ... 203
Robarts v. Brice, . . . 547
Robb v. Connor, . . . 245
Roberts v. Biggs, . . . 551
——— v. Casey, . . . 682
Robinson v. Wakefield, . 639, 640
Roe v. Cooney, . . . 109
Rosenberg v. Cook, . . . 70
Ryan v. Goddard, . 161, 162, 170, 171, 179

S.

St. Helen's Smelting Company, v. Tipping, . . . 260
Sale, *In re*, 133, 135, 137, 138, 141
Schoole v. Noble, . 548, 551, 552
Scott v. Avery, 723, 724, 725, 726
—— v. Comte de Richebourg, 553, 555
—— v. Mercantile, &c., Society, 725
Scovell v. Gardiner, . . 55, 59
Searle v. Choat, . . . 652
Seymour v. Quirke, 109, 111, 112, 113, 114
Sharp v. Wakefield, . . 273
Sheffield (Earl of) v. London Joint Stock Bank, . . 220
Short v. M'Carnay, 320, 333, 343
Simpson v. Hanrahan, 301, 304, 305, 321, 323, 336, 342, 343
Smith v. Allen, . . . 725
——— v. Buller, . . . 244
——— v. Butler, . . . 11
———, *Ex parte*, . . . 402
——— v. Harrison, . . 72, 74
Smith v. Lancaster, . 320, 368
——— v. St. Michael, Cambridge, (Overseers of), . . . 369
Smyth v. Chambers, 301, 305, 343
——— v. Moore, 480, 482, 483, 484, 485, 486, 487
Soto, The, ... 121
South Llanharran Railway Co., *In re*, ... 116
South Meath Election Petition, *In re*, ... 245
Starling v. Cozens, . 547, 553
Stevenson and Others, *Ex parte*, 185
Storer, *Re*, ... 121
Stracey v. Blake, . . . 402
Stribling v. Halse, . . . 332
Stuart's Trusts, . . . 116
Stubb's Estate, . . . 653

T.

Tassell v. Ovenden, . . 263
Taunton, *Ex parte*, . . 162
Tayleur v. Wildin, . 445, 451
Taylor v. Vaughan, . . 86
Tennent v. Robinson, . . 64
Thomas v. Thomas, . . 4
Thompson v. Lord Templetown, 435
Tobin v. Cleary, . . . 482
Toms v. Cunning, . . . 133
Torish v. Sproule, 300, 302, 305, 320, 333, 343
Torrens v. Cook, . . . 593
Toulmin v. Millar, . . . 98
Trainor v. Phœnix Fire Insurance Co., ... 725

V.

Vance v. Vance, . . . 445
Verner v. Cochrane, . . 401
Verschoyle v. Perkins, . . 228
Vines v. London, Brighton, and S. C. Railway Co., . . 245
Viney v. Bignold, 723, 724, 725, 726

W.

Wall v. Eyre, . . . 645
Waterford, &c., Railway Co., *In re*, ... 116
Waterford Turkish Baths Co. v. Barter, . . 20, 21, 22, 23
Watson v. Watson, . . 224
Westropp v. Elligott, 405, 468, 470, 471
White v. White, . 640, 641, 645
Willats v. Kennedy, . . 660
Wilmot v. Wilkinson, . . 70
Wilson v. Marshall, . . 661
Wright v. Redgrave, . . 653

CORRIGENDUM.

Page 226, line 5, *for* "1822" *read* "1842."

NOTE.

The judgment of the Queen's Bench Division in THE QUEEN (MARSHALL) *v.* JUSTICES OF COUNTY TYRONE, p. 246, has been reversed by the Court of Appeal.

CASES

DETERMINED BY

THE QUEEN'S BENCH AND EXCHEQUER DIVISIONS

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1894.

HONORA MOLONY *v.* MARY MOLONY AND MARTIN MOLONY (1).

Q. B. Div.
1893.
Feb. 20, 24.

(1892. No. 962.)

Statute of Limitations—Tenancy from year to year—Adverse possession—Possession of executor named in, but not proving, will—Possession of widow of testator—Executor de son tort*—Trustee.*

D. M. died in 1873, having by his will appointed X and Y his executors, and thereby bequeathing his farm of 140 acres, held from year to year, to his widow M. M., and bequeathing certain legacies charged thereon. Neither executor proved. M. M. went into possession, managed the farm, supported her family, and paid off some of the legacies. In May, 1880, M. M. (by an arrangement with X, and with the landlord's consent) surrendered the farm to the landlord, and was thereupon reinstated as tenant of portion (60 acres), while the remainder was let to X, as tenant from year to year. In 1887, H. M., a legatee, obtained letters of administration (X and his co-executor being cited,

(1) Before HOLMES, GIBSON, and MADDEN, JJ.

Q. B. Div. 1893.

MOLONY v. MOLONY.

but not appearing), and now, by writ dated the 29th January, 1892, brought ejectment on title against M. M. and X. X defended, pleading the Statute of Limitations. On new trial motion:—

Held, that M. M., having entered under the will to carry out its intentions, could not rely upon the statute; and that, therefore, X could not rely upon any portion of M. M.'s possession to assist his title.

Per Holmes and Gibson, JJ., that X, being the executor named in, though he did not prove, the will, could not rely upon his own possession as a defence under the statute.

MOTION to set aside judgment entered for the defendant at the trial, and to have judgment entered for the plaintiff. The action, which was an ejectment on the title, for the recovery of a farm of 140 acres, brought by Honora Molony, as administratrix of her father Denis Molony, deceased, against Mary Molony, widow, and Martin Molony, brother of the deceased, was tried before Mr. Justice O'Brien, without a jury, at the Limerick Summer Assizes, 1892.

The facts, so far as material to this report, were as follows:—Denis Molony died in 1873, being at his death possessed of a farm of land of 140 acres, held by him, as tenant from year to year, under Lord Leconfield. He was married three times. Of his first marriage he left one son, Donat; of his second, four children, one of whom was the plaintiff Honora Molony. By his third wife, Mary Molony, the defendant, he left four children.

By his will, Denis Molony appointed the defendant Martin Molony, and another, executors, and bequeathed his said farm to his widow Mary Molony. He left legacies to the plaintiff Honora Molony, and to his other children; and these legacies were, by his will, charged expressly on the said farm so bequeathed.

Neither executor proved the will. Mary Molony went into possession and managed the farm for several years, her own children residing with her and being supported by her, and also, for a time, the plaintiff Honora Molony. It was proved at the trial that Mary Molony paid off a legacy of £400, bequeathed by said will to her stepson Donat Molony. Subsequently, in 1880, finding herself unable to manage the whole farm, she consulted her brother-in-law, the defendant Martin Molony, who lived at a short distance from her, and made an arrangement with him, to which the landlord's agent consented. In pursuance of this

arrangement, she made a surrender, in writing, of the holding to the agent on the 15th May, 1880, and was re-admitted as tenant of 60 acres, while a formal letting from year to year of the remaining 80 acres was made to Martin Molony. Martin Molony subsequently obtained an order of the Irish Land Commission, fixing a fair rent on this holding for a statutory term.

In the year 1887, Honora Molony, who was then 22 years of age, applied for and obtained a grant of letters of administration, with the will annexed, of the estate of her father Denis Molony, the executors having been cited but not appearing; and shortly afterwards instituted administration proceedings in the Chancery Division, naming Mary Molony as defendant. Mary Molony did not enter any appearance, and the Chief Clerk's certificate found that none of the legacies had been paid, and that the 60 acres in Mary Molony's hands were assets of the estate, adjourning the consideration of the question as to the portion in the hands of Martin Molony in order to allow the plaintiff to bring the present action for the recovery of same.

The present action was accordingly instituted, by writ dated the 29th January, 1892, against Mary Molony and Martin Molony: Mary Molony entered no appearance, while Martin Molony limited his defence to the 80 acres in his possession.

In her statement of claim the plaintiff submitted that the Statute of Limitations could not be relied upon as a defence, and that, if a new tenancy had been created in Martin Molony, the same should be declared a graft upon, and subject to, the trusts affecting the tenancy as it existed at the date of the death of Denis Molony. The defendant, Martin Molony, pleaded the Statute of Limitations, the creation in 1873 of a new tenancy in Mary Molony according to the custom of the estate, and the surrender which was made in 1880, relying at the trial upon the defence of the Statute.

Mr. Justice O'Brien gave judgment for the defendant, holding that the case was distinguishable from *Quinton* v. *Frith* (1) and *Mulhern* v. *Dorian* (2); that there was an express gift to the wife, who thus became, in 1873, entitled to the farm in her own right;

(1) Ir. R. 2 Eq. 396, 494. (2) 17 Ir. L. T. R. 74.

Q. B. Div. 1893.

MOLONY v. MOLONY.

that no one did interfere, nor could the executor have interfered except upon proof of the will, and for the object merely of satisfying the debts or outstanding legacies; and that by the will there was impressed on the land a constructive trust merely, insufficient to stay the operation of the Statute.

W. Kenny, Q.C., *George Wright.*, Q.C., and *W. F. Kenny*, for the plaintiff.

Matthew J. Bourke, Q. C., and *C. Doyle*, for the defendant, Martin Molony.

[Counsel referred to the following cases: *Mulhern* v. *Dorian* (1); *Quinton* v. *Frith* (2); *Rankin* v. *M'Murtry* (3); *Jackson* v. *M'Master* (4); *Thomas* v. *Thomas* (5); *Clarke* v. *Clarke* (6).]

Cur adv. vult.

Feb. 24.

HOLMES, J.:—

This case comes before the Court upon motion to set aside the judgment entered for the defendant at the trial before Mr. Justice O'Brien, and to have judgment entered for the plaintiff. The action is brought by Honora Molony, administratrix of her father, Denis Molony, deceased, against Mary Molony, widow, and Martin Molony, brother of the deceased, for the recovery of a farm of land. The facts of the case are these:—Denis Molony died in 1873, leaving a will, by which he appointed Martin Molony and another executors, and bequeathed the farm, now in question, which was a letting of some 140 acres, held from year to year under Lord Leconfield, to his wife Mary Molony the defendant. He left legacies to the plaintiff Honora Molony, who was his daughter by a previous marriage, and to others; and these legacies were by his will expressly charged upon the land so bequeathed.

The will was not proved by the executors. Mary Molony, the widow, went into possession of the farm; and upon the evidence

(1) 17 Ir. L. T. R. 74.
(2) Ir. R. 2 Eq. 396, 494.
(3) 24 L. R. Ir. 290.
(4) 28 L. R. Ir. 176.
(5) 2 K. & J. 79.
(6) 9 App. Cas. 733.

in the present case it appears that she did so under the will, with the intention of carrying out its provisions, and that she did actually pay some of the legacies. In 1880 she agreed with Martin Molony to sell or transfer to him a portion of the farm; and this was carried out by an arrangement with the landlord who made what purported to be a new letting of about 80 acres of it to Martin, the remaining 60 acres continuing in the occupation of Mary.

Some years afterwards Honora Molony, the plaintiff, obtained a grant of letters of administration with the will annexed, Martin Molony, and the other executor named, having been cited, but not appearing; and she shortly afterwards commenced proceedings in the Chancery Division for the administration of the estate of Denis Molony, naming Mary Molony as defendant. The assets were administered in that suit, and Mary Molony was decreed to account for the rents and profits which she had received from these lands. It was found by the Chief Clerk's certificate that the legacies, or some of them, bequeathed by the testator, were still unpaid, and that the farm was part of the then outstanding assets. Thus, so far as Mary Molony was concerned, we have the declaration of a Court having jurisdiction in the matter, and in a suit properly instituted, that the farm continued to be assets of the testator. She had, therefore, no answer to the action; and, acting, as I have no doubt, upon good advice, she delivered no defence; nor does the defence by her co-defendant cover the portion of the farm of which she was, and is, in possession.

The only question, therefore, is whether Martin Molony can defend for the portion of the farm which he got in 1880 under the circumstances which I have already mentioned. He has confined his defence in substance to the 80 acres which he then got; and this was the question tried before Mr. Justice O'Brien, resulting in a judgment for the defendant.

Taking the date at which he got actual possession of the premises, namely May, 1880, and the date of the commencement of this action 27th January, 1892, the twelve years, required by the statute to confer a title, would not have elapsed. It is admitted by his counsel that to give him a title he must add, to the period during which he has been himself in possession, a portion of the

Q. B. Div. 1893.

MOLONY v. MOLONY.

Holmes, J.

time during which Mary Molony was in possession. I have already called attention to the fact that, if she had not transferred the land to Martin Molony, she could not herself have relied in this action on the statute. The judgment of the Vice-Chancellor has settled this. If, therefore, we were to hold that Martin Molony could rely upon the statute, there would exist the curious anomaly that for some months Mary Molony would have been gaining a title by adverse possession for Martin, while, so far as she was concerned herself, her possession during the same period was not adverse. Still, Martin, not being a party to the action before the Vice-Chancellor, is not bound by the decree, and he may therefore contend here that the portion of Denis Molony's farm, of which he is in possession, is not now part of his assets, and cannot be recovered by his personal representative.

When Mary Molony entered into possession at the death of her husband, she entered without any title. So far as any evidence appears in the case, the executor did not assent; but, even if he had purported to do so, his assent would have been ineffectual, as he never proved the will. But although she entered without title, it is clear from the evidence that she represented herself as claiming under the will, that she took possession pursuant to its provisions for the purpose of paying off the legacies, and that she was or professed to be engaged in carrying out this intention as long as she continued in occupation. Under these circumstances I am of opinion that her possession was that of the persons entitled under the will; that it could not enure to give her a title as against them, and that she could not rely on it to defeat the right of a person legally representing the estate of the testator.

Therefore I should hold that, even if Martin Molony could sustain the case that the statute began to run in his favour when he went into possession himself, he is not entitled to call in aid any portion of the period for which his predecessor was in possession, and that therefore his defence must fail. There is moreover another point which, in my opinion, entitles the plaintiff to judgment. Martin Molony knew that he was executor under the will; he knew the contents of the will; he knew that Mary Molony went into possession under it, and endeavoured to carry out its provisions. Under these circumstances, if he, being the executor,

though he had not proved, took a conveyance from her, whether for valuable consideration or not, it would seem to me that he would hold as executor, and that the liabilities of an executor would attach to him. He would be in the position of an express trustee, and would not be at liberty to say, after a few years, that the Statute of Limitations had given him a title to the premises. In the present case there was no actual conveyance, but the arrangement made with the consent of the landlord was practically the same thing. For this reason also I hold that the defendant Martin Molony must fail. I understand that up to the present judgment has not been given against Mary Molony. Judgment will accordingly be entered against both defendants, with costs as against Martin Molony.

GIBSON, J. :—

I concur for the same reasons.

MADDEN, J. :—

I concur in the decision of the Court. I rest my judgment upon the character of Mary Molony's possession before the transaction which took place in 1880. I think it clear upon the evidence that Mary Molony was in the position of an executrix *de son tort*, managing portion of the assets, with the cognisance of the person named as executor, and for the benefit of the persons entitled under the will.

As to the possession of Martin Molony after the year 1880, it is unnecessary to decide whether the trust by which the lands are affected in his hands remained an express trust, such as would prevent him from relying upon the Statute of Limitations, or became a constructive trust only. He had not been in possession for the statutory period of twelve years at the date of the commencement of the action. He is, therefore, obliged to call in aid the possession of Mary Molony, which cannot, in my opinion, be regarded as adverse to the title under the will.

Solicitor for the plaintiff: *T. Lynch.*
Solicitors for the defendant: *Dundon & Doyle.*

A. E. R. J.

Q. B. Div.
1893.
April 28.

PATRICK M'GANN, Appellant; JAMES KELLY, Respondent (1).

Selling or keeping open shop for retailing poisons—Pharmacy (Ireland) Act, 1875 (38 & 39 Vict. c. 57), section 30—Pharmacy (Ireland) Act, 1875, Amendment Act, 1890 (53 & 54 Vict. c. 48), section 15.

The offence of selling or keeping open shop for the sale of poisons under the Pharmacy (Ireland) Act, 1875, section 30, is not repealed or affected by the enactment of the Amendment Act, 1890, section 15.

Case stated, pursuant to the provisions of 21 & 22 Vict. c. 43, by the justices of Co. Tipperary, for the opinion of the Queen's Bench Division, in the matter of a complaint, heard at Templemore Petty Sessions, on the 15th February, 1893, in which Patrick M'Gann, Sergeant, Royal Irish Constabulary, was complainant, and James Kelly, respondent, that the defendant "did on the 31st January, 1893, sell and keep open shop for retailing and dispensing poison within the meaning of the Act of the Session of the 33rd and 34th of the Reign of Her Present Majesty, cap. 26, and did sell and retail and dispense a poison to the complainant at Main-street, Templemore, Co. Tipperary, contrary to the Pharmacy Act (Ireland), 1875 (38 & 39 Vict. c. 57), section 30, the defendant not being a person properly qualified in that behalf according to law."

The case stated was to the following effect:—

At the hearing before the justices it was proved that the complainant, on the 31st January, 1893, purchased at the shop or place of business of the defendant in Templemore, a packet of a medicine called "Mrs. Winslow's Soothing Syrup," and paid therefor; that he sent the said packet to be analysed by Professor Charles R. C. Tichborne, Analyst for the Pharmaceutical Society of Ireland; that said Professor Tichborne certified that the medicine was upon analysis found to be a syrup containing a paregoric and also ·238 (one quarter) of a grain of morphia, equal to about one-third of a

(1) Before O'Brien, Johnson, and Holmes, JJ.

grain of hydrochlorate of morphia, a poisonous dose for a child (the certificate being produced in evidence); that the defendant was not a registered chemist and druggist, or registered druggist, or a person authorized to sell poisons; and that the complainant had on a previous occasion cautioned the defendant against the sale of similar "medicines."

At the hearing, the justices—notwithstanding the objection made on behalf of the complainant—being of opinion that a technical offence only had been committed, which could be more properly dealt with under section 15 of the Pharmacy (Amendment) Act, 1890 (53 & 54 Vict. c. 48), and that the fact that the summons had been brought under the principal Act did not preclude them from dealing with the case under the Act of 1890, inasmuch as by the latter Act (section 23) both Acts were to be read together and construed as one (just as by a similar express enactment the Licensing Acts of 1872 and 1874 were to be read and construed as one Act), and that consequently the meaning and intention of the Legislature was to be gathered from the several parts of the Acts taken together—and being furthermore of opinion that, by the 40 & 41 Vict. c. 56, s. 76, they were empowered to amend the summons by citing the Amendment Act therein, after the recital of the principal Act—decided to amend, and amended the summons accordingly, and imposed upon the defendant a penalty of one shilling and one shilling costs. By a mistake the amendment upon the summons referred to sect. 17 of the Act of 1890, instead of sect. 15; the justices submitted, however, that, having regard to the provisions of the 40 & 41 Vict. c. 56, sect. 76, this mistake was immaterial, and further that, in view of the said statutory provisions, it was unnecessary for their decision to have made any amendment in the summons.

The defendant appeared at the hearing, but was not professionally represented, and no "legal objections" were taken by him.

The Case Stated then prayed the opinion of the Court upon the question whether the justices were correct in point of law in making the said amendment, and in the determination by which they inflicted a penalty of one shilling and one shilling costs on the defendant, or whether they had power to inflict a less penalty than £5, and generally.

Q. B. Div. 1893.

M'Gann v. Kelly.

The Pharmacy (Ireland) Act, 1875 (38 & 39 Vict. c. 57), s. 30, provides:—

"So much of the Act of 1791 as prohibits the keeping of open shop within the meaning of the said Act, by any person other than a licentiate of Apothecaries' Hall, shall be repealed; provided always that it shall be unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons within the meaning of 33 & 34 Vict. cap. 26, or medical prescriptions, unless such person be registered as a pharmaceutical chemist, or a chemist and druggist, under this Act, or to assume or use the title of pharmaceutical chemist, or pharmaceutist, or pharmacist, or dispensing chemist, or the title of chemist and druggist, in any part of Ireland, unless such person shall be registered as a pharmaceutical chemist, or as a chemist and druggist, respectively, under this Act; and any person acting in contravention of this enactment, or compounding any medicines of the British Pharmacopœia, except according to the formularies of the said Pharmacopœia, shall, for every such offence, be liable to pay a penalty of £5; but no such penalty shall exempt any person from being liable to any other penalty, damages, or punishment to which he would have been subject if this Act had not passed."

The Pharmacy Act (Ireland), 1875, Amendment Act, 1890 (53 & 54 Vict. c. 48), s. 15, provides:—

"From and after the passing of this Act it shall be unlawful for any person to assume, and from and after the 1st day of January, 1892, it shall be unlawful for any person to use, the title of a registered druggist, or chemist and druggist, in any part of Ireland, or to sell poisons, unless such person shall be registered as a chemist and druggist, or registered druggist, under this Act, and any person acting in contravention of this enactment shall, for every such offence, be liable to pay a penalty not exceeding five pounds."

Macinerney (with him *Gordon, Q.C.*), for the complainant:—

The justices were asked to decide one matter, but insisted on deciding another, in spite of objection. The powers of amendment given to them could not conceivably extend to that. It must be taken that they considered that the provisions of the Pharmacy Amendment Act, 1890, s. 15, superseded and abrogated the provisions of the Pharmacy Act, 1875, s. 30. But the two enactments deal with different offences, and there is no inconsistency between them. The latter Act contains nothing which could by implication be thought to repeal the affirmative provisions of the 30th section

of the principal Act. [HOLMES, J.: Section 17 certainly seems to favour that view, and to refer to section 30 of the principal Act as continuing still in force, where it makes provision in respect of persons lawfully keeping open shop for selling, retailing, or mixing poisons.]

The medicine in question is a proprietary medicine, and is not within the exemption of patent medicines, the government stamp upon the packet being merely affixed for revenue purposes. The object of the Legislature in fixing the minimum penalty at £5 is obvious, and is most necessary for the protection of the public, and in relief of those prosecuting such cases in the interests of the public.

Ryan, Q.C. (with him *C. MacDermot*), appeared on behalf of the justices, and on behalf of the Crown, but was not heard,—O'Brien, J., stating that it would be an evil precedent to allow justices, upon Cases Stated by them, to descend from the position of Judges and enter into the arena of litigation, and Holmes, J., referring to the cases of *Smith* v. *Butler* (1) and *Moore* v. *Smith* (2).

There was no appearance for the defendant (respondent).

O'BRIEN, J.:—

We are all of opinion that the magistrates were not right in their decision. It is quite plain from the view taken by them—upon the suggestion of somebody who seems to have inspired them with an amount of legal information that they were not likely to have possessed otherwise—that they had the idea in their minds that the offence under the earlier statute of keeping open shop for the sale of poisons did not exist any longer except in a qualified form under the provisions of the latter Act for the registration of properly qualified persons. They cannot, however, be said to have acted consistently upon this principle, for they convicted the defendant as if there had been an offence actually committed; though there was no offence, if their view was correct. For section 17, of the Act of 1890, to which Holmes, J., has referred, says that any person lawfully keeping open shop for selling poisons shall personally manage and conduct such shop, or shall employ a

(1) 16 Q. B. Div. 349. (2) 1 Ell. & Ell. 597.

Q. B. Div. 1893.

M'GANN v. KELLY.

properly qualified assistant; and that section would be wholly unintelligible and without meaning unless the provisions of the previous Act continued in force. It was plainly the object of the Act of 1890 to establish a new offence and to enact a new penalty applicable to that alone.

We are clearly of opinion that the magistrates were bound to convict, and to impose a fine upon the defendant of £5, and no less sum. The case will accordingly be remitted to them with the opinion of this Court to that effect.

JOHNSON, and HOLMES, JJ., concurred.

Solicitors for the complainant: *Casey & Clay.*

A. E. W. J.

Q. B. Div. 1893.

Oct. 30.

THE MARQUIS OF HEADFORT, APPELLANT; FARRELLY, RESPONDENT (1).

Summary jurisdiction—Trespass in pursuit of game—Preservation of Game Act (27 Geo. 3, Ir., c. 35), sect. 10—Evidence.

Upon the hearing of a complaint, under 27 Geo. 3 (Ir.), c. 35, for unauthorized trespass in pursuit of game, it is not enough, to entitle a defendant to a dismiss, that it is not proved that he was actually seen pursuing or destroying game, or attempting to do so, if other evidence sufficiently lead to the inference that the offence was committed.

CASE STATED, pursuant to 20 & 21 Vict. c. 43, for the opinion of the Queen's Bench Division, by the Justices of county Cavan, in reference to a complaint heard before them at Petty Sessions, Virginia, on the 3rd August, 1893. The complaint was "that defendant Michael Farrelly, on the 7th July, 1893, did enter and trespass upon a plantation of the complainant, the Marquis of Headfort, at Ryefield, in pursuit of game, the defendant at said time not being duly authorized so to do, contrary to the statute," &c.

(1) Before HARRISON, HOLMES, and MADDEN, JJ.

On the hearing before the justices, F. Oxley, under-gamekeeper in complainant's employment, stated that having heard several shots in said plantation he went there, and found defendant with a gun in his hand coming out of said plantation, and when he (Oxley) challenged defendant, the latter ran away. The plantation was in complainant's own hands, and pheasants and other game were reared therein. The justices stated—"No evidence was produced on behalf of the defendant, but we dismissed the complaint on the merits, deciding that inasmuch as the witness for the complainant could not prove that he saw defendant beating for, pursuing, or destroying game, or attempting to do so, the complaint could not be sustained. Complainant relied upon 27 Geo. 3, c. 35, ss. 10 & 11, and argued that the mere fact of defendant being proved to have been found trespassing, unauthorized, on complainant's land, having a gun in his hands, was sufficient evidence to sustain his case. The defendant appeared, and was represented by a solicitor. We state this case for the opinion of the Court, at the request of the complainant, as to whether we, the said justices, were correct in point of law in our determination as aforesaid, or as to what should be done in the premises."

R. Dane, for the appellant:—

The evidence was sufficient to sustain a conviction under 27 Geo. 3, c. 35 (Ir.), s. 10, which enacts that no person, not being duly authorized, shall go, or enter, upon the land of any other person to look for . . . shoot, course, hunt, hawk, or otherwise pursue, take, or destroy any sort of game . . . under a penalty not exceeding £10. The decision of the Exchequer Division in *Kingston* v. *O'Neil* (1) has been questioned in this Court in *Irvine* v. *Osborne* (2), and *Reg.* (*Palmer*) v. *Reilly* (3).

[HARRISON, J.: *Kingston's Case* (1), if binding, would be directly in point; but this Court has twice expressed the opinion that that decision was unsatisfactory; the dismiss might, perhaps, be unimpeachable if it was a mere finding of fact; but the justices treated the question as one of general principle and

(1) 6 L. R. Ir. 101. (2) 25 Ir. L. T. R. 36. (3) 30 L. R. Ir. 302.

Q. B. Div. 1893.

HEADFORT v. FARRELLY.

of law, and so put it to this Court. Under section 6 of 20 & 21 Vict. c. 43, the Court can remit the matter to the justices, with the opinion of the Court thereon, and we shall adopt that course in the present case.]

There was no appearance for the defendant.

THE COURT remitted the case to the justices, with their opinion thereon—"that the justices were not correct in point of law in determining that the evidence given before them was not sufficient to sustain a conviction, provided that the justices drew from it the inference that the offence charged was committed," and with a declaration "that the justices were, in point of law, at liberty, but not bound, to draw such inference from the said evidence."

Solicitor for appellant: *Richard Allen.*

A. E. Ř. J.

Q. B. Div. 1893.

Nov. 11.

SPENCER *v.* HAYES & CO. (1).

(1893. No. 4443.)

Costs—Action of contract where plaintiff recovers less than £20—Plaintiff's costs of unsuccessful motion to set aside judgment by default—Common Law Procedure Act, 1853, sect. 243 [R. S. C., Order LXV. (1893), Rule 3].

Section 243 of the Common Law Procedure Act, 1853—providing that where a plaintiff in an action of contract recovers (exclusive of costs) less than £20, he shall not be entitled to more than one-half the ordinary costs—does not apply to the costs of a motion to set aside a judgment by default, where such motion has been refused with costs.

MOTION to review taxation.

The defendant not having pleaded to the writ in this action, indorsed for £14 11*s.* 9*d.*, balance due for goods sold and de-

(1) Before HARRISON, GIBSON, and MADDEN, JJ.

livered, and the plaintiff having obtained judgment by default for that sum, the defendant served notice of motion to have said judgment set aside. This motion was, on the 26th June, 1893, refused, with costs, to be paid by the defendant to the plaintiff when taxed and ascertained.

When plaintiff's costs of this motion were being taxed before Master Davis (the solicitors for plaintiff and defendant attending), the question was raised whether plaintiff was not entitled to half costs only (under section 243 of the C. L. P. Act, 1853). The plaintiff's solicitor producing no authority for his contention, the Taxing Master, having allowed the case to stand over for consideration, ruled, and so certified, that half costs only were chargeable.

R. F. Todd, for the plaintiff, moved. He stated that the defendant's solicitor had appeared before the Master, had contended that the plaintiff was entitled to half costs only, and so had rendered the present application necessary.

There was no appearance for the defendant.

THE COURT held that the motion to set aside the judgment obtained by default came neither within the spirit, nor the letter, of the section. The section was intended to apply to the ordinary costs in actions for small amounts which the plaintiff could have brought in the County Courts. In such cases a plaintiff who voluntarily adopts the more expensive mode of procedure is allowed half costs only. But, where judgment has been marked, the plaintiff is entitled to defend a motion, instituted by the defendant, to set the judgment aside; for such a motion, if successful, might involve the plaintiff in serious liability.

Order accordingly, with £3 3*s. costs.*

Solicitor for plaintiff: *T. R. Coffey.*

A. E. R. J.

Q. B. Div. 1893.
Nov. 22.

REV. W. A. BEAUFORT *v.* PATRICK LEDWITH (1).

(1893. No. 10,778.)

Practice—Specially indorsed writ—R. S. C., Order III., Rule 6; *Order XIV., Rule* 1.

In a special indorsement of a writ, under Order III., Rule 6, it is essential that the dates at which the items mentioned in the particulars became payable should be set out.

Quære—How far is a special indorsement on a writ of summons subject to the rules of pleading governing statements of claim?

The application in this country of the principles laid down in *Casey* v. *Helyer* (17 Q. B. Div. 97) mooted.

MOTION for final judgment, under R. S. C. Order XIV., Rule 1, on writ indorsed as follows:—

STATEMENT OF CLAIM.

The plaintiff's claim is for £92 10*s.*, being one-half year's rent and arrears of part of the lands of Corballis, in the county of Meath, held by the defendant as tenant thereof to the plaintiff, under a lease dated 14th May, 1868, from Emma A. Beaufort and others to Patrick Ledwith, at the yearly judicial rent of £180.

PARTICULARS.

	Arrears rent due, ...	£2 10 0
1893, May 1st.	One half-year's rent due at this date,	90 0 0
		£92 10 0

(Signed,) J. W. HARDMAN & SONS.

J. W. Richards, for the plaintiff, moved.

Jefferson, for the defendant:—

The writ is not specially indorsed within Order III., Rule 6. The plaintiff is not the lessor named, nor necessarily one of them,

(1) Before O'BRIEN, HOLMES, and MADDEN, JJ.

and no devolution of title to the plaintiff is asserted or shown: *Casey* v. *Helyer* (1); *Cullen* v. *Jackson* (2).

The lease is referred to in the affidavit grounding this motion; but the indorsement is a statement of claim: *Cassidy* v. *M'Aloon* (3), and must stand or fall by itself. So considered, the indorsement is ambiguous and insufficient; for there are, it appears, several lessors, and the lessee's covenant to pay rent may be joint and several, or joint merely.

[HOLMES, J.: But, even considered strictly as a pleading,

(1) 17 Q. B. Div. 97 (action for recovery of land against a term-expired lessee).

(2) CULLEN v. JACKSON, [1893. No. 2273.] Q. B. D., 25th April, 1893.

W. F. Kenny moved for final judgment, on writ indorsed thus:—"Statement of claim: The plaintiff's claim is to recover possession of all that and those the dwelling-house and premises, . . . which said house and premises were demised to one Edmund O'Beirne for the term of seventy-one years, from the 29th September, 1821, by a lease dated 22nd June, 1821, and made between Luke Duff of the one part and E. O'Beirne of the other part, and which said term has expired. All the lessor's interest in the said lease, and the reversion expectant on the expiration thereof, became and is now vested in the said plaintiff. The defendants are in possession of the said premises, and withhold possession of same from the plaintiff. The plaintiff claims the possession of the said house and premises. (Signed,) W. G. JEFFERSON."

J. H. Campbell, Q.C., for the defendant:—1. The words of O. III., R. 6, and O. XIV., R. 1, do not contemplate cases involving questions of devolution of title, or any but simple cases between the original lessor and his tenant; and no privity of contract is here shown, either by proof of devolution of title from the lessor to the plaintiff as his assignee, or by estoppel (*e.g.* payment of rent): *Casey* v. *Helyer* (17 Q. B. D. 97). [O'BRIEN, J.: Would not that put an end to most of such motions for final judgment in this country?] 2. The writ does not show any contract of tenancy whatever existing between plaintiff and defendant.

W. F. Kenny, in reply:—A special indorsement need not be so full or complete as a statement of claim, strictly so called, in which it is only necessary to aver generally that the estate of the lessor became vested in the plaintiff: *Musgrave* v. *Walsh* (6 L. R. Ir. 335). The Court should now allow the indorsement to be amended by stating the contract of tenancy.

THE COURT (O'Brien, Johnson, and Holmes, JJ.) refused leave to amend, and held that the indorsement was bad upon the second ground of objection, without deciding the first point raised by defendant's counsel.—[A.E.R.J.]

(3) 32 L. R. Ir. 368.

Q. B. Div. 1893.

BEAUFORT v. LEDWITH.

the reference to the lease would entitle the Court to look at that document.]

[Counsel for plaintiff admitted that the covenant in the lease was joint merely.]

Further, the "Particulars" do not give the date at which the item for arrears fell due. The date is essential (1). This part of the claim might be statute-barred.

Richards asked for leave to amend, by striking out the item for arrears, but was refused.

THE COURT held that, on the last ground of objection raised, the indorsement was bad, as not giving the date when the item for arrears (£2 10*s.*) became payable to the plaintiff. Upon the other point, which was one of greater difficulty, it was therefore unnecessary, and the Court declined, to express any opinion.

Solicitors for the plaintiff: *Hardman & Sons.*
Solicitor for the defendant: *Alfred Henry.*

A. E. R. J.

Q. B. Div. 1893.
July 7.

NORTHERN BANKING CO. (LIMITED) *v.* BAILEY AND MOORE (2).

(1893. No. 5844.)

Practice—Motion for judgment—Specially indorsed writ—R. S. C., 1891, *Order XIV., Rule* 1—*Embarrassing pleading.*

In an action by the indorsee for value of a cheque against drawer and indorser, the mere setting out a copy of the cheque, without more does not constitute a special indorsement of the writ of summons, entitling the plaintiff to move for judgment, under Order XIV., Rule 1.

MOTION by the plaintiffs for judgment for £19 2*s.*, and cross-motion by the defendant Bailey to set aside the writ, on the ground that the statement of claim indorsed was embarrassing.

(1) See cases cited in Annual Practice (1894), p. 233, *sub tit.* "Goods Sold."—[REP.]

(2) Before WARREN, J., sitting for the Division.

The indorsement, which was signed by the plaintiffs' solicitor, was as follows:—

STATEMENT OF CLAIM.

The plaintiffs' claim is for £19 2*s*. Particulars:—

Castleblayney, 20th May, 1893.

To the Agents of the Bank of Ireland here.

Pay to Mr. George Moore, or order, nineteen pounds stg.

JOHN BAILEY.

£19 2 0 Indorsed—GEORGE MOORE.

From the affidavit of the plaintiffs' manager in support of the motion it appeared that the indorsement on the writ was the copy of a cheque drawn by the defendant Bailey, and which they cashed for the defendant Moore. On being sent to the Bank of Ireland for collection it was returned noted "Payment stopped by Mr. Bailey."

Philip White, for the plaintiffs.

H. W. Jackson, for the defendant Bailey.

HIS LORDSHIP refused the motion for judgment, with costs, and made no rule on the cross-motion; but directed a further statement of claim to be delivered.

Solicitor for the plaintiffs: *Joseph Boyle.*

Solicitor for the defendant Bailey: *R. E. Bailie.*

W. G.

Ex. Div. 1893. Nov. 9.

GREVILLE AND OTHERS *v.* HAYES (1).

(1893. No. 675.)

Practice—Third party—Order (*S. C. Ir.*, 1891) *XVI., Rule* 53.

In an action against the personal representatives of a deceased lessee on a covenant to repair in the lease, the defendant having obtained leave to serve a third party notice on an assignee of the lease, applied for directions under Order XVI., Rule 53:—

Held, that as the third party was not liable for any breach of covenant prior to the assignment, the plaintiff had reasonable grounds for objecting to the question of the liability to indemnify the defendant for subsequent breaches being tried in the action, and that the third party should be dismissed.

If the third party objects, it is unnecessary for him to serve notice to be dismissed, as the Court has power to dismiss him on the hearing of the application for directions.

Waterford Turkish Baths Co. v. *Barter* (17 Ir. L. T. R. 61) applied.

MOTION by the defendant for directions pursuant to Gen. Ord. XVI., R. 53; and a cross-motion by B. B. Leetch to discharge an order dated 8th March, 1893, giving the defendant liberty to serve him with a third party notice.

The action was brought to recover damages for breach of covenant to repair. The material facts were as follows:—By an indenture of lease dated 23rd June, 1852, and made between the predecessors in title of the plaintiffs of the one part, and Evory Carmichael of the other part, certain premises were demised to the lessee to hold for the term of thirty-four years; subject to a covenant, amongst others, on the lessee's part to keep the said premises in good and tenantable repair, and at the determination of the lease to deliver up same in good and tenantable condition. The said lease expired on the 25th March, 1886, and the lessee thereafter continued until the date of his death on 16th May, 1890, to hold the same premises as a yearly tenant. After his death, his widow, the present defendant, on the 9th July, 1890,

(1) Before ANDREWS, J.

obtained letters of administration to his personal estate. In the month of October, 1892, the said administratrix assigned to one B. B. Leetch all her right, title, interest, and estate in the premises, subject to the covenants in said lease contained, so far as same appertained to the defendant's interest. On the 7th February, 1893, the present action was commenced against the defendant, the said administratrix, for damages for breach of covenant to repair. The defendant thereupon caused a third party notice to be served on the said B. B. Leetch; and the plaintiffs thereupon moved to set aside the said notice.

Falconer, for the defendant.

S. L. Brown, for Leetch.

Denning, for the plaintiffs:—

There may be a dispute between the defendant and the third party; but the adding on of the third party will only embarrass the plaintiffs' rights: *Waterford Turkish Baths Co.* v. *Barter* (1); and *Pontifex* v. *Foord* (2).

ANDREWS, J.:—

Although upon an application of this kind there may be jurisdiction to grant it under Ord. XVI., R. 53, still the facts of each particular case must be considered, in order to determine whether, having due regard to the rights and interests of all parties, the question as to the liability of the third party to make or give either in whole or in part, the contribution or indemnity claimed by the defendant is one which "is proper to be tried" in the pending action. The defendant in this action may have, and, for the purposes of my decision, I will assume has, a right to some, though apparently not to any very substantial, amount of contribution or indemnity from the third party; but I have to consider and decide whether this question between the defendant and the third party is "proper to be tried" in the present action.

It appears that the premises in question were originally held for thirty-four years under a lease to E. Carmichael, dated the

(1) 17 Ir. L. T. R. 61. (2) 12 Q. B. Div. 152.

Ex. Div. 1893.

GREVILLE v. HAYES.

Andrews, J.

23rd June, 1852, which contained the usual covenant by the lessee to keep and give up the premises in good repair. After the term expired the lessee continued to hold the demised premises, of which he accordingly became yearly tenant on the terms of the lease. He afterwards died, and the defendant became his legal personal representative. On the 22nd October, 1892, the tenant's interest was assigned to the third party, whose covenant to perform the lessee's obligations, and keep the assignor indemnified, cannot, in my opinion, be construed as retrospective. It operates, however, from the date of the assignment, and it came into effect some months before the commencement of this action; and as I have mentioned, I shall assume, for the purposes of my decision on the present application, that it gives the defendant a right to be indemnified by the third party against some part of the damages recoverable in this action. The case of the *Waterford Turkish Baths Co.* v. *Barter* (1), though not in the authorized reports, appears to be very well reported in the *Irish Law Times.* I concurred in the decision of the Court in that case, and although its facts are not identical with the facts of the present case, the grounds of the decision are applicable. The Chief Baron, in his judgment in that case, said:—"As between the plaintiff and the defendant, what is the question as to damages? It is, the premises being out of repair, what is the injury that the plaintiff has sustained by their being so? It is no matter to the plaintiff at what period they were let go out of repair; but this is the whole question as between the defendant and the notice party—namely, how much the want of repair is due to what occurred after the assignment of the lease. The plaintiff might recover very large damages by reason of the breach of the covenant to repair which occurred before the assignment, and none at all by reason of any subsequent breaches. If the defendant allows judgment to go by default . . . the judgment would not be conclusive as against the third party, unless we framed two issues, one for the prior, and the other for the subsequent, damages. The plaintiff has a right to say that we ought not to do that, because it would involve him in difficulty and embarrassment, and lead to the discussion of questions in which he is

(1) 17 Ir. L. T. R. 61.

not interested at all." The Court declined to give any directions on the application in that case, and dismissed the third party from the action, and the grounds on which they did so apply to the present case.

The plaintiff in this action objects to be embarrassed by questions between the defendant and the third party with which he has no concern. The ascertainment of the damages which accrued before the third party became assignee, and the damages, if any, which accrued afterwards, is one of those questions. It is suggested that the construction of the third party's covenant to indemnify may be another. The covenant to repair in the lease of 1852 must be read with at least some regard to the condition of the premises at that time; and it may be argued that the third party's covenant in the assignment of 1892 ought to be read with some regard at least to the very different condition of the premises at that time. I think it is reasonable for the plaintiff to object, as he does, to these questions (some of which may give rise to difficulties in their solution, and to expense, and delay in their determination), being brought into his action against his will; and the third party also objects to their being tried in this action. There is power, no doubt, under the 53rd Rule of Ord. XVI. to direct them to be tried *after* the trial of the action; but it appears to me that this would be even more inconvenient, in a case like the present, than a trial of them at the trial of the action. Under these circumstances, and having regard to the case of the *Waterford Turkish Baths Co.* v. *Barter* (1), which, although its facts were not identical, and although the General Order then in force was not in this respect identical with the General Order under which the present application is made, I nevertheless regard as having an important bearing on the present application, I am of opinion that the questions between the defendant and the third party are not "proper to be tried" in this action, and that the defendant's application for directions ought to be refused, and the third party dismissed from this action, which, of course, will not deprive the defendant of such right of indemnity by the third party as may exist between them. As the third party has, for precaution's sake, served a separate notice to

(1) 17 Ir. L. T. R. 61.

Ex. Div. 1893. GREVILLE *v.* HAYES. Andrews, J.

be dismissed, the defendant's notice for directions and the third party's notice are to be treated as they have been heard, as one motion; and, in my opinion, it will in future be quite unnecessary for the third party to serve an independent notice of motion to be dismissed from the action when the defendant moves for directions, as I consider that the Court or a Judge has ample power upon the defendant's motion for directions to make an order similar to the order I shall make in the present case, refusing the defendant's application for directions, and dismissing the third party; and I shall also direct the defendant to pay a proper measured sum to the plaintiff, and to the third party for their costs of this motion.

Solicitors for the defendant: *Larkin & Co.*
Solicitor for the plaintiffs: *J. A. Denning.*
Solicitors for the third party: *Tobias & Co.*

J. P., B.

Ex. Div. 1893. Oct. 26.

CONNER *v.* LYONS.

(1893. No. 4736.)

Landlord and tenant—Action for rent—Subsequent order fixing fair rent—Relation back—Credit for over-payments—Land Law (Ireland) Acts, 1881, sect. 51, 1887, sect. 5.

An action for rent was brought on the 26th September, 1893. On the 28th September, 1893, the defendant obtained an order fixing a fair rent upon an originating notice which had been served in August, 1889. Calculating the rent due at the rate so fixed, and giving the tenant credit for over-payments in respect of earlier gales of the old rent, after the service of the originating notice, the total amount due for rent was reduced below £20:—

Held, that the plaintiff was not entitled to any costs of the action.

MOTION for final judgment, and cross-motion to remit.

The action was brought to recover £37 10*s.*, whereof £12 10*s.* was a balance of one year's rent, at the rate of £25 a-year, due the 25th March, 1892, and £25 was one year's rent at the same rate, due the 25th March, 1893. The writ, which was specially

indorsed, was issued on the 26th September, 1893, and served on the 30th September, 1893. The defendant, on the 7th October, 1893, entered an appearance, and served notice of motion to remit. The defendant filed an affidavit, wherein he denied owing the £37 10*s.* claimed, but admitted that he owed £14 10*s.* 5*d.* On the 6th October. 1893, before the entry of the appearance and the service of the notice of motion to remit, he tendered the said sum of £14 10*s.* 5*d.* to the plaintiff's agents, and they admitted that the said sum was the correct amount, but refused to accept the same unless he paid £2 10*s.* the costs of the writ, which he refused to pay. He further deposed that his former rent was £25, and that in August, 1889, he served an originating notice to fix a fair rent. The application was heard by the Sub-Commissioners on the 11th July, 1893, and on the 28th September, 1893 (subsequent to the issue of the writ), the Sub-Commissioners pronounced their decision, fixing the fair rent at £18 12*s.* 6*d.* On the 6th October, 1890, he paid £12 10*s.*, clearing all rent due up to the 29th September, 1889, and since then he paid £50, which, calculating the rent at the judicial rate, and after allowing for the difference, and deducting poor-rate, left the sum of £14 10*s.* 5*d.* due on the 25th March, 1893. The plaintiff served a cross-notice to mark final judgment for £15 3*s.* 9*d.*, grounded on an affidavit of one of the plaintiff's agents; and in which affidavit it was deposed that the amount due at the date of the issue of the writ was £37 10*s.*, but the exact amount due up to 25th March, 1893, consequent on the decision of the Sub-Commissioners, and after giving credit for the difference in the rents, and allowing for poor-rates, was £14 10*s.* 5*d.* It was further deposed that, on the 6th October, 1893, after the tender had been made, it was discovered that a mistake had been made in claiming £2 10*s.* costs, and that the proper sum claimable was £1 5*s.* Thereupon a letter was written to the defendant, informing him of the mistake, and claiming the sum of £15 15*s.* 5*d.*, being £14 10*s.* 5*d.* rent, and £1 5*s.* costs, and stating that on payment of same all further proceedings would be stayed. On a subsequent day a similar letter was written by the plaintiff's solicitors to the defendant's solicitor, but no notice was taken of these communications. The exact amount due by the defendant, without deducting poor rate, was £15 3*s.* 9*d.*

Ex. Div. 1893.

CONNER v. LYONS.

Both motions were disposed of together.

H. D. Conner, for the plaintiff :—

The right of the plaintiff to costs must be determined with regard to the state of the debt at the time of the issue of the writ : *O'Malley* v. *Guardians of Kilmallock Union* (1), and General Order XXIV., Rule 3. Even admitting that he is not so entitled, and that the rent is to be taken as at the judicial rate, the amount due would be £27 18*s.* 9*d.*, and the defendant would only be entitled to defend by a plea of set-off, as a matter arising *puis darrein continuance.*

Harney, for the defendant :—

The defendant is not entitled to any costs : sect. 51, Land Law (Ireland) Act, 1881.

PALLES, C. B. :—

The order of the Land Commission related back to the first gale day after the application to fix a fair rent, and therefore each of the three unpaid gales sued for must be treated as having amounted, *at the time of the issue of the writ*, to £9 6*s.* 3*d.* only.

As against £27 18*s.* 9*d.*, the amount at this rate of the three gales sued for, the defendant was entitled to credit on foot of earlier gales, which reduce the net amount payable to a sum under £20. The defendant can rely upon these overpayments as *deductions* from the gales now sued for (50 & 51 Vict. c. 33). Is he entitled to plead these deductions otherwise than "*puis darrein continuance*"? I think he is.

As the order has relation back, I think that the right to deductions must, in the event which has happened, be treated as having accrued at the dates of the overpayments, and not at that of the order of the Sub-Commission.

The case is therefore within sect. 51 of the Act of 1881, and the plaintiff is not entitled to costs.

ANDREWS and MURPHY, JJ., concurred.

(1) 22 L. R. Ir. 326.

"No rule on motion to remit; no rule on motion to mark final judgment, if the defendant should, within one week, pay to the plaintiff £15 3*s.* 9*d.*; but in default of such payment, final judgment for £15 3*s.* 9*d.* to be entered, without costs of the action or motion."

Solicitors for the plaintiff: *Exham & Sons.*
Solicitor for the defendant: *M. Purcell.*

J. P. B.

MOLLAN, GRANTOR; KIERAN, GRANTEE (1).

Land Com. 1893. Oct. 26. Nov. 13.

Redemption of Rent (Ireland) Act, 1891 (54 & 55 *Vict. c.* 57)—*Fair rent—Fine—Improvements.*

Where a grantor does not consent to the application of his grantee for redemption of a fee-farm rent under the Redemption of Rent (Ireland) Act, 1891, and the Court proceeds, on the alternative application, to fix a fair rent of the holding, the grantee is not entitled to any deduction in respect of a fine, in consideration of which, and of the surrender of a lease, the grant was made; nor is he entitled to be exempted from rent in respect of any improvements made by him or his predecessors in title.

Diss. O'Brien, Commissioner.

REHEARING, on the application of the grantor, under the circumstances stated in the judgment of Bewley, J. (2).

The fee-farm grant was made between the predecessors in title of the present parties.

(1) Before BEWLEY, J., and FITZGERALD, Q.C., and O'BRIEN, Commrs.

(2) The following is a report of the judgment of Mr. W. F. Bailey (Legal Assistant Land Commissioner) at the Drogheda Land Commission, May 10th, 1893, in this case:—

Mr. BAILEY:—This is an application, under the Redemption of Rent Act, 1891, to have a fair rent fixed, the landlord or grantor not having consented to the redemption of the rent. On behalf of the grantor it is argued that the landlord is entitled to get rent on all the improvements made by the tenant, notwithstanding that the 1st section of the Redemption of Rent Act says that the grantee, under circumstances such as we have before us, shall be held to be a tenant of a present tenancy, and that his holding shall be subject to the provisions of the Act of 1881, as modified by the Act of 1887, with regard to present tenancies. These provisions include the celebrated 9th sub-section of the

Land Com. 1893.

MOLLAN, *Grantor*; KIERAN, *Grantee.*

Roche, Q.C., and *Teeling*, for the grantee:—

The grantee is placed by the Act of 1891 in the same position as a lessee within section 1 of the Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33). Section 7 of the Landlord and Tenant (Ireland) Act, 1870 (33 & 34 Vict. c. 46) directs compensation to

8th section of the Act of 1881, which exempts tenants from having rent put on improvements for which they have not been compensated. Mr. Cherry, for the landlord, argues that whereas the decision of the Court of Appeal in *Adams* v. *Dunseath* (10 L. R. Ir. 109) allows a tenant to claim exemption from rent, only where he could have claimed compensation for improvements under the 4th section of the Act of 1870; and as the grantee of a fee-farm grant could, under no circumstances, have claimed under the latter section, he is also excluded from the 9th sub-section of the 8th section of the Act of 1881. This result appears startling, when we are aware that on one of the holdings before us on this estate improvements to the value of some thousands of pounds have admittedly been made by the tenant or grantee since obtaining his grant. It appears to me, however, that there is no reason why we should apply the rule laid down in *Adams* v. *Dunseath* to fee-farm grants. That case was argued and decided on a class of cases that were subject to the provisions of *both* the Acts of 1870 and of 1881. The Court of Appeal, in deciding it, knew that they were dealing with a case that came within the 4th section of the Act of 1870 as well as the 8th section of the Act of 1881. But the grantee of a fee-farm grant does not come within the Act of 1870 at all. Therefore, the 4th section of that Act does not apply to him, and I can see no reason for forcing him into a section which was never intended for him. I cannot see why a grantee should be deprived of his improvements when having a fair rent fixed merely because he is not entitled to claim under a statute with a completely different purview. I am accordingly of opinion that a grantee of a fee-farm grant applying to have a fair rent fixed is untrammelled by the provisions of the 4th section of the Act of 1870, and is governed only by the 9th sub-section of the 8th section of the Act of 1881 (interpreted here without the other section), which provides that no rent shall be made payable in respect of improvements made by a tenant, and for which he has not been compensated.

A second question of equal if not greater importance arises in this case, namely, whether the tenant is entitled to have the fine of £450, paid by him on getting his grant, taken into account in reduction of his rent. I have already decided, stating my reasons, in the cases of *Gault* v. *Wilson* (26 Ir. L. T. & S. J. 432) and *Noble* v. *Brady* (26 Ir. L. T. & S. J. 348), that the tenant is entitled to credit for such fine. When deciding these cases I was not aware that any authoritative decision had been given on the subject. I have since found that the question was discussed and decided by the Chief Land Commission in the case of *O'Neill* v. *Cooper*, in which judgment was

be awarded to a tenant in respect of money paid by him with the consent of his landlord on account of his coming into his holding. The Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), sect. 8, sub-sect. 10, implies that a fine paid to the landlord may, in a proper case, be taken into consideration in fixing a fair rent, and

given by O'Hagan, J., on May 7th, 1889. The case has, unfortunately, not been reported. It would, however, appear from the shorthand writer's report (*Freeman's Journal*, May 9th, 1889) that Mr. Justice O'Hagan, in giving judgment, after quoting the words of sub-section 10 of the 8th section of the Act of 1881, said:—"The words 'otherwise than to the landlord or his predecessors in title' apparently imply that money paid to the landlord or his predecessors for the tenancy might form such ground. We do not think that any line can be laid down as to reducing the rent to the extent of any rate of interest, but we think it is one of the circumstances of the case which we are to take into account." This appears to be an authority in favour of my reading of the 8th section of the Act of 1881, sub-section 10.

It has also been argued in these cases that the words "as if his lease had expired," in section 1 of the Act of 1887, would oblige us to regard a lessee or grantee as if in the position for all purposes (including his claim for allowance in consideration of any fine he may have paid), of a person whose lease or grant had come to an end; and that consequently, even if the fine were paid to secure a part interest in the holding during the currency of the lease or grant, we are now bound to look on the transaction as if the lessee had had the full benefit of the term in his lease. It appears to me, however, that the words "as if his lease had expired" refer only to the "manner" and the "conditions" under which the lessee is to be deemed to hold, namely, the rents and the conditions in the lease which are "applicable to tenancies from year to year," referred to in section 21 of the Act of 1881. In the case of a fee-farm grant it would appear doubtful if the effect of the Redemption of Rent Act is to destroy or alter it in any way other than to apply to it the provisions as to rent, &c., which attach to present tenancies under the Acts of 1881 and 1887.

We shall accordingly deal with the fine in this case as we have done in the cases I have referred to. In *Gault* v. *Wilson* and in *Poynton* v. *Smyth* (26 Ir. L. T. & S. J. 612) I have explained the system which I think should be adopted in such a case. The rent of the holding when the grant was taken out was £100 a-year. Capitalizing this at twenty-five years' purchase we get £2500. Adding the fine to this we get £2950 as the estimated capitalized value of the holding when the grant was made. The fine was equal to about one-sixth of the entire capitalized value. We shall accordingly regard the share of the fair rent to which the tenant is now entitled in respect of the fine as one-sixth. This we subtract from the fair rent, leaving the judicial rent at £70 a-year.

Land Com. 1893.

MOLLAN, *Grantor*; KIERAN, *Grantee.*

here the payment is recited in the grant. In *Noble* v. *Brady* (1), a leaseholder, and in *Gault* v. *Wilson* (2), a fee-farm grantee were held entitled by Bailey, Assistant-Commissioner, to have fines paid by them taken into account in fixing fair rents. The grantee is also entitled to exemption from rent in respect of his improvements: the Act gives him the rights of a tenant of a present tenancy.

Campbell, Q.C., and *Cherry*, for the grantor:—

The grantor is entitled to rent in respect of the improvements, and no deduction should be made on account of the fine. The intention of the Act of 1891 was to give the right merely to have a fair rent fixed, as if on the expiration of a lease, not to confer rights which, by the Acts of 1881 and 1887, are given to tenants from year to year and leaseholders. Mr. Bailey's decision is that a grantee is in a better position than a leaseholder. Section 7 of the Act of 1870 applies only to the case of a tenant paying a fine on coming into a holding for the first time. Sect. 8, sub-sect. 10, of the Act of 1881 only provides that the mere fact of a fine having been paid to a person other than the landlord shall not be a ground for reducing or increasing the rent, but does not necessarily require that a fine is to be taken into account in all cases where it has been paid to the landlord, but leaves that to the determination of the Court, according to the circumstances of each case. Moreover, to entitle a party to an exemption from rent on his improvements, he must be a person entitled to compensation for improvements under the Act of 1870: *Adams* v. *Dunseath* (3), and the judgment of Sir E. Sullivan, M. R., at page 140–141: a fee-farm grantee is not entitled to compensation for improvements.

Nov. 13.

O'BRIEN, Commissioner:—

The questions raised in these two cases (4) are, whether the grantees applying to have fair rents fixed are entitled to credit for fines paid to the landlord, and to exemption of their improvements from rent.

The fines of £450 by Kieran, and £700 by Doherty, were paid under the following circumstances:—

(1) 26 Ir. L. T. & S. J. 348.
(2) *Ibid.* 432.
(3) 10 L. R. Ir. 109.
(4) Mr. O'Brien's judgment relates also to the case of Mollan, *Grantor*; Doherty, *Grantee.*

Land Com. 1893.

MOLLAN, *Grantor*; KIERAN, *Grantee.*

O'Brien, Com.

In 1875 or 1876 they surrendered leases with terms of about thirty years unexpired, and obtained fee-farm grants at their old rents. There was nothing very unusual in this; in 1876 the universal experience was that land had been continuously increasing in value; many persons at that time surrendered leases, and not only paid fines, but increased rents, to get fee-farm grants, for which, at the time, there was a perfect rage.

These tenants, with mistaken foresight, wished to secure themselves and their successors against future increases of rent, and on obtaining the grants, appear to have made many and expensive improvements. Since 1875 agricultural land has immensely diminished in value, and the Redemption of Rent Act was passed to give relief to grantees holding at what had become excessive rents.

On receipt of originating notices under the Redemption of Rent Act the landlord elected to let the cases go under the fair rent provisions of the law, instead of consenting to redemptions, though in the latter event the tenants' improvements might have been deemed to have increased the landlord's security for rent.

To my mind, the necessary inference from the words "otherwise than to the landlord," in sect. 8, sub-sect. 10, of the Land Law Act is that payment of a fine to the landlord *may* be taken into account in fixing the rent. I am confirmed in this opinion by the decision of Judge O'Hagan in the case of *O'Neill* v. *Cooper* (1), in which the two other Commissioners concurred.

If land had risen as much as it has fallen in value, it might be argued that the fines paid in 1875 showed the rent to be low then, and consequently still lower now; and that the landlord was, therefore, entitled to an increase of rent. Unfortunately for both landlords and tenants, land has fallen very much in value, and the fines, if taken into account, can only be so by way of reduction. I think the principle adopted by the Sub-Commission, as explained by Mr. Bailey in his judgment, is right, viz. to treat the grantees as part owners to the extent of their fines, and to apply the fall in

(1) Not reported. Judgment given 7th May, 1889. [On the application of the landlord, a case was stated by the Land Commission for the Court of Appeal, but it was not prosecuted, the tenant having agreed to purchase the landlord's interest.—REP.]

Land Com. 1893.

MOLLAN, *Grantor;* KIERAN, *Grantee.*

O'Brien, Com.

value to the tenants' as well as to the landlord's interest. This resulted, at the Sub-Commission rent, in allowing the tenant two and a-half per cent. interest on his fine.

With respect to improvements, the contention that the landlord is entitled to rent, not only on the land, but on the buildings and improvements made by the grantees, amounts to a claim for the rack-rent of the farms, as the fair rent. This would be an absurd result, and would reduce the fair rent provisions of the Redemption of Rent Act to a nullity. The circumstances in which the Act was passed, and the evil it was meant to remedy, must be considered, and a construction which will give some effect to the law, rather than one which gives none, is indicated by both the letter and spirit of the Act. Grantees are to be held tenants of present tenancies, and as such are entitled to be exempted from rent on their improvements. It was further contended that the buildings were in excess of the requirements of these holdings, and that if the improvements generally are to be exempted, the landlord is entitled to rent on the excess value of the buildings.

I cannot agree with this contention. If the buildings have added to the value of the holding they are an improvement. If they are useless, and have not added to the value, there is nothing on which to assess rent. But the description given by witnesses of the buildings did not lead me to think they were excessive. The method of valuing the buildings adopted by some of the witnesses is, in my opinion, wrong. One valuer estimated the annual value of the buildings at five per cent. on their original cost. It is a matter of universal experience, and that not only in Ireland, that expenditure on farm houses and offices is seldom remunerative. The valuer said that five per cent. *ought* to be obtained; the real question is whether it *is* obtained.

As a rule farm buildings are let with, and could not be let without, land; when this is so they cannot be valued separately; if they can be let separately their value is not a percentage on their cost, but what experience shows they would actually let for, with a deduction for maintenance and repairs. Any other principle is unreal, artificial, and conjectural.

The only doubt I have is whether sufficient allowance has been made by the Sub-Commission for the large and costly

improvements made by the tenants, and for the condition particularly of Doherty's farm, which is clearly due to good cultivation and heavy manuring, on which no rent should be assessed. I think the Sub-Commission rents should stand confirmed.

BEWLEY, J.:—

Two questions of law of considerable importance and some difficulty arise in the present case. The proceedings were instituted by the grantee under the Redemption of Rent (Ireland) Act, 1891, for the purpose of redeeming the perpetual yearly rent of £100, created by an indenture of fee-farm grant, dated the 1st October, 1875, or, in the event of the grantor not signifying his consent thereto in the prescribed manner and within the prescribed time, then for the purpose of being deemed a tenant of a present tenancy and having a fair rent fixed. The prescribed consent was not given, and thereupon the case was sent down to a Sub-Commission, who by an order, dated 11th May, 1893, fixed the fair rent of the holding at the yearly sum of £70. The holding contains about 100 statute acres, and various improvements of a substantial character in the way of buildings and drainage were executed on it by the grantee or his predecessors in title. Prior to the execution of the fee-farm grant the grantee was tenant of the holding for the unexpired residue of a term of sixty-one years, created by an indenture of lease, dated the 12th February, 1851, at the yearly rent of £100, and the fee-farm grant was executed in consideration of the surrender of this lease and the payment to the grantor of a fine of £450.

In estimating the fair rent Mr. Bailey, the legal Assistant-Commissioner, was of opinion that an allowance should be made to the tenant in respect of this fine, and further, that the tenant was entitled to be exempted from rent in respect of *all* improvements made by him or his predecessors in title, consisting of the buildings and drainage works to which I have already referred. Acting on this view, the Sub-Commission allowed the tenant a sum of £12 per annum on foot of the fine of £450, and a certain other annual sum in respect of the drainage improvements, by way of deduction from what otherwise would, in their opinion, be the fair rent, and also exempted him from rent in respect of the buildings

Land Com. 1893.

MOLLAN, *Grantor;* KIERAN. *Grantee.*

Bewley, J.

erected by him or his predecessors in title; and the questions for us to decide are:—1, Whether the payment of the fine is to be taken as a ground for reducing the rent of the holding? and, 2, Whether the tenant is entitled to be exempted from rent in respect of all or any of the improvements?

In dealing with the first of these questions, it is important to consider, in the first instance, the provisions of section 8 of the Land Act of 1881. The first sub-section of that section enables the tenant of any present tenancy to which the Act applies to apply to the Court to fix a fair rent of his holding, which rent is to be determined by the Court, "having regard to the interest of the landlord and tenant respectively"; and the 10th sub-section provides that, "the amount of money or money's worth that may have been paid or given for the tenancy of any holding by a tenant or his predecessors in title, *otherwise than to the landlord* or his predecessors in title, shall not of itself, apart from other considerations, be deemed to be a ground for reducing or increasing the rent of such holding."

This cannot be taken as a positive enactment that the amount of money paid to the landlord for the tenancy of any holding must, apart from other considerations, be deemed to be a ground for reducing the rent of such holding, but must be construed, at most, as a declaration that under certain circumstances the payment of a fine to a landlord may be an element in estimating what the fair rent of a holding should be. If a fine or "input" (as it is frequently called) has been paid to the landlord by the incoming tenant of a holding subject to the Ulster custom in respect of the tenant-right it must, undoubtedly, in my opinion, be taken into consideration, in fixing the fair rent of the holding; or if, as is sometimes the case, a fine has been paid for the purpose of acquiring the improvements made on the holding by a previous tenant or by the landlord, the payment is an element that cannot be disregarded in determining the judicial rent. But where, on the granting of a lease, a fine has been paid, either for the purpose of obtaining the security of a term, or for the purpose of obtaining a letting at a reduced rent, or partly for one of these purposes and partly for the other, I fail to see how the payment can be deemed a ground for reducing the rent. Take the case of

two tenants, A and B, holding two farms of the same letting value, on the same estate. The landlord, prior to 1881, offers to give each of them a lease of his holding for thirty-one years, at a yearly rent of £100, or in the alternative at a rent of £80 per annum, if a fine of £200 is paid. A elects to pay the fine of £200, and obtains a lease at a rent of £80 a-year, while B, being unable or unwilling to pay the fine, is given a lease for the same term at a yearly rent of £100. On the expiration of the leases, A and B avail themselves of the provisions of the 21st section of the Land Act of 1881, and apply to the Court to have fair rents fixed of their respective holdings. It is found, that owing to the general fall in prices of agricultural produce, the fair letting value of each holding is now £75. Is there any reason for making a deduction from this in A's case by reason of the fine paid on granting the lease? He has obtained all the advantage that he bargained for, and the very thing for which the fine was given, namely, the privilege of paying the reduced rent of £80 during the entire term, and there certainly appear to be no equitable grounds for holding that B, who, perhaps, has paid the full rent of £100 for many years after it became a rent considerably in excess of the letting value, should be placed in a worse position than A. The case where the fine has been paid merely for security of tenure appears to me to stand on the same footing. If a tenant from year to year, paying a rent of £100 per annum, pays a fine of £100 to obtain a lease for thirty-one years at the same rent, and enjoys the possession of the holding during the term, he has obtained the full consideration for which the fine was given, and does not appear to have any legitimate grounds to get back in any shape a portion of the fine, no more than he has to be recouped any part of an excessive rent that by his contract of tenancy he may for many years have been obliged to pay.

In the cases put, I have assumed that the tenant waited until the expiration of his lease by effluxion of time, and then availed himself of the benefits of the 21st section of the Act of 1881. But if instead of so waiting, he applied during the currency of his lease to have a fair rent fixed under the combined provisions of the Land Acts of 1887 and 1881, I do not think he would be in any better or different position. Where a lessee takes advantage of

Land Com. 1893.

MOLLAN, *Grantor*; KIERAN, *Grantee.*

Bewley, J.

the first section of the Land Act of 1887 he is to "be deemed to be a tenant of a present tenancy in like manner, and subject to like conditions . . . . *as if his lease had expired.*" This section enables him to apply *in præsenti* instead of waiting for the expiration of his lease; but though he can thus anticipate future rights, he cannot enlarge these rights: *Moylan* v. *Finch* (1); *Barton* v. *Atkinson* (2). In the case of *Clements* v. *Tighe* (3), where it appeared from the terms of a lease that the lessee was not to be entitled to any compensation for improvements on the expiration of the lease, which was for a term of thirty-five years; and the lessee applied to have a fair rent fixed when nine years only of his term had elapsed, it was held by this Court that he could not be exempted from rent in respect of buildings erected by him or his predecessors in title; and this decision was affirmed by the Court of Appeal. It appears clear to me, therefore, that if a lessee would not be entitled to claim any allowance in respect of a fine paid to the landlord in proceedings taken by him to have a fair rent fixed after the expiration of his lease, neither can he obtain such an allowance, if the proceedings are taken during the continuance of the term.

In the present case the application to fix a fair rent is made under the last clause of the first section of the Redemption of Rent (Ireland) Act, 1891, which provides, that if the lessor or grantor does not consent to the redemption of the rent, the redemption shall not be made, but the lessee or grantee, as the case may be, shall be deemed to have made the prescribed application under section 1 of the Act of 1887, and shall be held to be a tenant of a present tenancy in manner, and subject to the conditions and right of resumption mentioned in section 21 of the Act of 1881, as modified by section 1 of the Act of 1887; and his holding shall be subject to the provisions of the said Acts with regard to present tenancies. This enactment, so far as the question of a fine is concerned, does not put a grantee under a fee-farm grant in a better position than a lessee applying to have a fair rent fixed under the Land Acts of 1887 and 1881. If the fine has been paid to secure a perpetual interest, the Redemption of Rent Act leaves the interest still an estate in fee-farm; but whatever may have

(1) 28 L. R. Ir. 595. (2) 30 L. R. Ir. 396. (3) 26 Ir. L. T. R. 100.

been the purpose for which the fine has been paid, it is impossible, in my opinion, to deal with it on principles different from those applicable to the case of an ordinary leaseholder.

For these reasons, I am of opinion that the Sub-Commission acted erroneously in the present case in deducting an annual sum in respect of the fine from what they would otherwise have determined to be the fair rent of the holding.

The second question is one of great practical importance, viz.:—"Is the grantee under a fee-farm grant, who has a fair rent fixed under the Redemption of Rent Act, entitled to be exempted from rent in respect of all or any of the improvements made by him or his predecessors in title?" The lessee of a holding not subject to the Ulster Custom, who holds under a lease for a term certain of not less than thirty-one years, cannot claim to be exempted from rent in respect of any improvements other than permanent buildings and reclamation of waste land, and it is therefore startling, if the grantee under a fee-farm grant has been placed by the legislature in a much more favourable position in this respect, and is, as decided by the Sub-Commission in this case, entitled to be exempted from rent in respect of *all* improvements, no matter what their nature may be.

The 9th sub-section of section 8 of the Land Act of 1881, provides that "no rent shall be allowed or made payable in any proceedings under this Act in respect of improvements made by the tenant or his predecessors in title, and for which, in the opinion of the Court, the tenant or his predecessors in title shall not have been paid or otherwise compensated by the landlord or his predecessors in title"; but this apparently general exemption was held by a large majority of the Court of Appeal in *Adams* v. *Dunseath* (1), to be controlled by the first sub-section of the same section which provides that the Court is to determine the fair rent, "having regard to the interest of the landlord and tenant respectively."

The effect of the decision in *Adams* v. *Dunseath* (1), as interpreted by the Land Commission in the fixing of fair rents during the last eleven years, is that a tenant, seeking to have a fair rent fixed, can only claim exemption from rent in respect of those improvements for which, if he were quitting his holding, he would

(1) 10 L. R. Ir. 109.

Land Com. 1893.

MOLLAN, *Grantor*; KIERAN, *Grantee.*

Bewley, J.

be entitled to compensation under the Land Acts of 1870 and 1881.

In *Adams* v. *Dunseath* (1), Sir Edward Sullivan, M. R., at page 138, expresses himself as follows:—"The 9th sub-section of section 8 of the Act of 1881, giving force to every word of it, can stand well together with the 8th section in all its parts. The mandatory duty cast thereby on the Commissioners is really one to be observed in administering the first part of the 8th section itself; and the meaning of it is this, that though the Commissioners are to consider the interests of landlord and tenant respectively, there is one thing they must do, viz. not fix any rent, that is an annual sum, in respect of improvements made by the tenant or his predecessors in title, not paid or otherwise compensated for by the landlord. These improvements are the very improvements he would be compensated for if he was leaving his holding, and no others—a view which, independently of the right interpretation of the two statutes as a whole, is made further manifest by the introduction of the 4th sub-section therein, enabling the Commissioners to disallow the application when the improvements had been maintained by the landlord or his predecessors in title."

Again, at page 141, the learned Judge states:—"This right of compensation is so clearly mixed up with the fixing of a fair rent, that I am, by what I conceive to be the plain intendment of the statute, as shown by its language, compelled to hold that on its true construction the right to get compensation for improvement is really the basis of the 9th sub-section of the 8th clause in the Act of 1881;" and further on he says that the right of the tenant to get compensation for his improvements, and his right to be exempted from rent in respect of them are, according to his view, almost, if not entirely, correlative. Again, at page 142, he proceeds:—"If one reads the 9th sub-section, *per se*, he would at first sight be disposed to give the word improvements a very wide interpretation; but when we find in the very statute in which this word is used a peremptory direction that its meaning shall be taken as in the former Act of 1870, the rule is at once enforced that that interpretation must be abided by, the context

(1) 10 L. R. Ir. 109.

not offering any obstacle. And when this is once determined, it seems to me to follow, as I have come to the conclusion, that the right to compensation for improvements is the true basis of the enactment in the 9th sub-sect. of sect. 8 of the Act of 1881; that the improvements mentioned in the sub-section must be taken as not merely defined in the Act of 1870, but also with the qualifications attached thereto by that statute, so far as the improvements were made before the passing of the Act of 1870."

The judgment of the Lord Chief Baron is to the same effect. At p. 158 he says: "If I be right in the conclusions at which I have arrived, viz. first, that the tenant had an *interest* in improvements made by himself or his predecessors in title, as used in its wider signification; secondly, that there is in the 9th sub-section an intention not to transfer property in improvements from landlord to tenant; what remains to satisfy the expression in the ninth sub-section, 'improvements made by the tenant or his predecessors in title, and for which, in the opinion of the Court the tenant or his predecessors in title have not been paid or otherwise compensated by the landlord or his predecessors in title?' I answer, that which can alone remain, unless some part of the property of the landlord in the improvements be transferred to the tenant, the *interest* of the tenant in the improvements, and this interest he can have in *such* improvements only as he had a *right* to receive compensation for. These are the improvements, and in my opinion the only improvements, within the section; and the property in this class of improvements is cut down by the words, 'and for which the tenant or his predecessors in title shall not have been paid or otherwise compensated by the landlord or his predecessors in title,' to the *interest* of the tenant therein which has been uncompensated by the landlord. This interest, although vested and existing, was one the money value of which depended upon a future and contingent event—upon his quitting his holding; and, in my opinion, the operation of this sub-section is to give effect *in præsenti* to that interest by exempting it from rent. Reading the sub-section in this sense, an effect is given to it which is consistent with every other provision of the section, and is in furtherance of the essential principle of that section, that 'regard shall be had to the *interest* of the landlord and tenant respectively.' But the improvements in which the tenant has this interest

Land Com. 1893.

MOLLAN, *Grantor;* KIERAN, *Grantee.*

Bewley, J.

include those made by his predecessors in title in the wider sense mentioned in the seventh section. I have therefore—1, that regard is to be had to the interest of the tenant; 2, that that interest includes interest in improvements in respect of which he has a right to claim compensation, that is, improvements made by himself or his predecessors in title as used in the wider sense; 3, a direction in the 9th sub-section that no rent shall be allowed in respect of the interest of the tenant in improvements made by him or his predecessors in title in respect of which he has a right to claim compensation."

Also Lord Justice Fitz Gibbon, at p. 180, states:—"The statutes of 1870 and 1881 are not merely *in pari materia;* they are, under sect. 57 of the latter Act, 'to be construed together as one Act,' except where inconsistent. Wherever the amount of fair rent is to be determined, the first duty imposed upon the Court is to 'have regard to the interest of the landlord and tenant respectively.' I cannot proceed to ascertain those interests while a tenancy continues, upon any other principles than those which are to regulate them if the tenant quits his holding."

If we apply the principles laid down by the Judges in *Adams* v. *Dunseath* (1) to the facts of the present case, it is to be observed that a grantee under a fee-farm grant does not come within the definition of a tenant in section 70 of the Landlord and Tenant (Ireland) Act, 1870, and is entirely outside the provisions of the Act giving a tenant the right to claim compensation for improvements. If the grantee under a fee-farm grant is evicted for non-payment of rent or for a forfeiture on a breach of covenant, and possession of the holding is obtained by the grantor, all the improvements made by the grantee or his predecessors become the absolute property of the grantor who is under no obligation to make any compensation whatever to the grantee. The grantee under a fee-farm grant, unlike a leaseholder, has no *interest* in the improvements other than that which he has in the land itself. It appears, therefore, to me to be the logical consequence of the decision in *Adams* v. *Dunseath* (1) that the grantee under a fee-farm grant who avails himself of the rent-fixing provisions of the Redemption of Rent Act cannot be exempted from rent in respect of any

(1) 10 L. R. Ir. 109.

improvements made by him or his predecessors in title. It is to be regretted, I think, that a grantee under a fee-farm grant has not been placed by the legislature in respect of improvements on the same footing as a long leaseholder; but I do not find that upon any legitimate construction of the statutes, I can hold that he is entitled to be exempted from rent in respect of permanent buildings and reclamation of waste land.

Land Com. 1893. MOLLAN, *Grantor*; KIERAN, *Grantee*. Bewley, J.

Under these circumstances, Mr. Fitzgerald and I are of opinion that the deductions made by the Sub-Commission to which I have already referred must be disallowed and a rent fixed on the lands and buildings as they now stand. The old rent was £100: the Judicial Rent, £70; and we now fix it at £88.

Solicitors for the grantor: *Meade and Richardson.*

Solicitor for the grantee: *John Clark.*

D. M'C. M.

GARNETT, TENANT; GARNETT, LANDLORD (1).

Land Com. 1893. Oct. 27. Nov. 13.

Landlord and tenant—Subtenancy determined by judgment in ejectment for non-payment of rent and service of eviction notices—Application by middleman to have fair rent fixed against his landlord before removal of caretaker—Occupation by middleman—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *s.* 57—*Land Law (Ireland) Act*, 1887 (50 & 51 *Vict. c.* 33), *s.* 7.

A tenant, having sublet to her own landlord, brought an action and recovered judgment for possession for non-payment of rent, and served the eviction notices under section 7 of the Land Law (Ireland) Act, 1887, a herd of the sub-tenant being at the time in occupation. More than a month after service, but before the period for redemption had expired, and without proceeding to obtain physical possession of the lands, the tenant served an originating notice to have a fair rent fixed in respect of her tenancy:—

Held, that the tenant was, at the date of the originating notice, in occupation of the lands.

RE-HEARING of application to have fair rent fixed.

Julia Garnett held the lands of Knockarenny from William Stawell Garnett, under lease dated the 10th November, 1831, for lives, at a rent of £37 10*s.* In 1878 she, by agreement in writing,

(1) Before BEWLEY, J., and FITZGERALD, Q.C., and O'BRIEN, Commrs.

Land Com. 1893.

GARNETT, *Tenant*: GARNETT, *Landlord.*

agreed to sublet the lands to the said William Stawell Garnett for the entire of her own interest therein, at a rent of £91 3*s.* 4*d.*; and the said William Stawell Garnett entered under the said agreement.

Julia Garnett brought an action to recover possession of the land for non-payment of the latter rent, and recovered judgment on the 2nd November, 1891. In the same month she, by permission of the Court, served the notices and posted the summary directed by section 7 of the Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33). William Stawell Garnett was at this time out of the country, Michael Brady, a herd of his, being in occupation of the lands.

On the 16th January, 1892, Julia Garnett served an originating notice to have a fair rent fixed. She subsequently proceeded against Michael Brady at Petty Sessions, and, on the 4th April, 1892, the justices ordered a warrant to issue, and possession was, on the 9th May, 1892, taken on behalf of Julia Garnett.

Julia Garnett was herself the last life in her lease. She died on the 25th May, 1892, and the fair rent proceedings were continued in the names of her executors.

On the 25th January, 1893, a Sub-Commission fixed a fair rent. William Stawell Garnett required a re-hearing.

Teeling, for the landlord:—

Julia Garnett was not in occupation at the date of the originating notice: real and *bona fide* occupation is necessary. The subletting was not of a temporary nature; it was made by a written document for the residue of the tenant's own term, and the subtenancy, as a matter of fact, lasted thirteen years. The judgment and service of the notices only conditionally determined the subtenancy; the sub-tenant had six months to redeem, and during that period he had an interest in the lands. The case must be treated as if the subletting were to a different person from the head landlord.

Gaussen, for the tenant, referred to *O'Riordan* v. *Kelly* (1), and the judgment of Fitz Gibbon, L.J., at p. 488, and section 7 of the Land Law (Ireland) Act, 1887.

(1) 16 L. R. Ir. 484.

BEWLEY, J.:—

The tenant Julia Garnett held these lands under a lease of the 10th November, 1831, for a term of three lives, at the yearly rent of £37 10*s*. It appears that by an agreement in writing, dated 11th February, 1878, she re-let the entire holding to her landlord, Mr. W. S. Garnett, for her own term, at a rent of £91 3*s*. 4*d*. The landlord, however, failed to pay this rent, and having fallen into arrear, the tenant was compelled to bring an ejectment against her landlord in the month of July, 1891, and recovered judgment for possession on 2nd November, 1891. The notices prescribed by the Land Act of 1887 were duly served on the 27th November, 1891, and thereupon, within the language of sect. 7 of the Act, Mr. W. S. Garnett became a caretaker. An originating notice to fix a fair rent was then served by Julia Garnett on the 16th January, 1892, and subsequently possession of the holding was obtained under a magistrates' order. On the hearing before us it was contended that at the time of the service of the originating notice Mrs. Julia Garnett was not in occupation. The language of the statute, however, is that "upon the determination of the tenancy by the service of such notice as aforesaid every person upon whom such notice is served shall thereupon be deemed to be a person put into possession as a caretaker, and the enactments of the Landlord and Tenant Law Amendment Act (Ireland), 1860, relating to persons put into possession of lands by permission of the owner as caretakers shall apply." If a writ of *habere* had been executed, and Mr. W. S. Garnett had been put into possession as caretaker, his occupation would be the occupation of Mrs. Julia Garnett; and in the events which have actually happened, I think he must be treated as if he had been actually appointed a caretaker, and cannot be allowed, as landlord, to set up his own occupation as ousting the right of the tenant to have a fair rent fixed. The old rent was £37 10*s*., and the judicial rent £37, which we confirm.

Solicitor for the tenant: *Thomas Y. Chambers.*
Solicitor for the landlord; *John C. Sullivan.*

D. M'C. M.

Land Com. 1893.

Dec. 1, 8.

MURRAY, TENANT; SCOTTISH PROVIDENT INSTITUTION, LANDLORDS.

OTHERS, TENANTS; SAME, LANDLORDS (1).

Agreement and declaration fixing fair rent filed in Court—Consent that same be taken off the file—Jurisdiction of Land Commission—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *s.* 8 (6).

Agreements and declarations, fixing the fair rents of tenants' holdings were duly filed in Court, pursuant to section 8 (6) of the Land Law (Ireland) Act, 1881. Many years afterwards an application was made, on consent, that same be taken off the file, in order that originating notices might be served, and fair rents fixed by the Land Commission:—

Held, that the Land Commission has no jurisdiction to make the order, the agreements and declarations being regular in form and untainted with fraud.

MOTION to make rules of Court certain consents, providing that the agreements and declarations fixing fair rents of the holdings in these cases should be taken off the file, in order that originating notices might be served, and fair rents fixed by the Land Commission.

Healy, in support of the motion:—

[BEWLEY, J.: What jurisdiction have we to make such an order?]

In cases on the Peyton Estate (2) Fitzgerald, Q.C., Commissioner, ordered similar agreements to be taken off the file.

[FITZGERALD, Q.C., Commissioner: In those cases I decided that the agreements were fraudulent.]

Dec. 8.

BEWLEY, J.:—

Applications have been made to us in these several cases on behalf of the tenants, in pursuance of consents signed by them and by the duly authorized agent of the landlords, that the agreements and declarations fixing the fair rents of their respective

(1) Before BEWLEY, J., and FITZGERALD, Q.C., Commissioner.

(2) *Evans, Tenant; Peyton, Landlord*, judgment, 7th Nov., 1893.

Land Com. 1893.

MURRAY, *Tenant;* SCOTTISH PROV. INST. *Landlords.*

Bewley, J.

holdings, filed in the Court of the Land Commission, may be taken off the file, with the object of enabling the tenants to serve originating notices to have judicial rents fixed by the Land Commission.

The agreements and declarations referred to appear to have been entered into at a time when Mr. William Ancketill was landlord, and were duly filed in Court under the provisions of section 8, sub-section 6, of the Land Act of 1881, and the Rules made under the Act. In William M'Geahy's case the agreement and declaration was signed so far back as the 16th December, 1882, and was filed on the 25th August, 1883; in Michael M'Carron's case it appears to bear date the 28th September, 1882, and was filed on the 1st December, 1882; in James Trainor's case it was signed on the 20th May, 1884, and filed on the 23rd March, 1885, and in this last case it was specially sanctioned by a ruling of the Receiver Judge in the matter of William Ancketill's estate. This information I have derived from an inspection of the original agreements of record in the Land Commission. I have been unable at present to ascertain the date of the agreement in Peter Murray's case, but assume it was entered into at least eight years ago.

An important question now arises as to whether, under these circumstances, this Court has any jurisdiction to grant the present applications.

By the 4th section of the Land Act of 1881 it is provided that where the landlord demands an increase of rent from the tenant of a present tenancy, and the tenant accepts such increase, then, until the expiration of a term of fifteen years from the time when such increase was made (in the Act referred to as a statutory term), such tenancy shall, if it so long continues to subsist, be deemed to be a tenancy subject to statutory conditions, with such incidents during the continuance of the term, as are in the Act mentioned.

Section 5 enacts that a tenant shall not, during the continuance of a statutory term in his tenancy, be compelled to pay a higher rent than the rent payable] at the commencement of such term, and shall not be compelled to quit the holding of which he is tenant, except in consequence of the breach of some one or more of the conditions specified in that section (and in the Act referred to

Land Com. 1893.

MURRAY, *Tenant;* SCOTTISH PROV. INST. *Landlords.*

Bewley, J.

as statutory conditions), the first of which is that "The tenant shall pay his rent at the appointed time."

I refer to these sections as they introduce into our law the expressions "statutory term" and "statutory conditions," and a consideration of them is necessary for the proper understanding of the 8th section.

The 1st sub-section of the 8th section empowers the Court (*i. e.* the Land Commission or the County Court, as the case may be) to fix a fair rent of a holding, on the application of the tenant of any present tenancy to which the Act applies, or of the tenant and the landlord jointly, or of the landlord in the case therein mentioned; and by the 2nd sub-section, as modified by section 5 of the Land Act of 1887, the rent fixed by the Court (in the Act referred to as the judicial rent) is to be deemed to be the rent payable by the tenant as from the gale-day next after the making of the application.

Sub-section 3 provides—"Where the judicial rent of any present tenancy has been fixed by the Court, then, until the expiration of a term of fifteen years from the rent-day next succeeding the day on which the determination of the Court has been given (in this Act referred to as a statutory term), such present tenancy shall (if it so long continue to subsist) be deemed to be a tenancy subject to statutory conditions, and having the same incidents as a tenancy subject to statutory conditions consequent on an increase of rent by a landlord" (subject to the modification therein mentioned).

Sub-section 6 enacts—"Subject to rules made under this Act, the landlord and tenant of any present tenancy to which this Act applies may at any time, if such tenancy is not subject to a statutory term, or if the tenancy is subject to a statutory term, then may, during the last twelve months of such term, by writing under their hands, agree and declare what is then the fair rent of the holding; and such agreement and declaration, on being filed in Court in the prescribed manner, shall have the same effect and consequences in all respects as if the rent so agreed on were a judicial rent, fixed by the Court under the provisions of this Act."

Sub-section 7 is—"A further statutory term shall not com-

mence until the expiration of a preceding statutory term, and an alteration of judicial rent shall not take place at less intervals than fifteen years."

And sub-section 8—"During the currency of a statutory term an application to the Court to determine a judicial rent shall not be made except during the last twelve months of the current statutory term."

In the present cases, on the filing of the agreements and declarations the rents agreed on became, to all intents and purposes, judicial rents, in the same manner as if they had been fixed by the Court, and each tenancy became subject to statutory conditions until the expiration of a term of fifteen years from the rent-day next succeeding the date of filing, if the tenancy so long continues to subsist. This statutory term has been running for a period varying from eight to nearly eleven years in the several cases; and under the provisions of sub-section 7 no further statutory term can commence until it has expired. The plain meaning of the several provisions of the statute to which I have referred is that there shall be no revision or re-settling of rent under the Act except at intervals of not less than fifteen years. Whether the judicial rent has come into existence through the acceptance of an increased rent, by an order of the Court, made on the application of tenant or landlord, or by an agreement and declaration duly filed in Court, the provisions of the Act cannot be resorted to for the purpose of fixing a new judicial rent or making the tenancy subject to a new statutory term at any time prior to the last twelve months of the current statutory term. If a present tenancy to which the Act applies is subject to a statutory term, sub-section 6 of section 8 is inapplicable, save during the last twelve months of the term, and the parties cannot by agreement fix a new judicial rent. This is manifest from the language of the sub-section; and if in such a case a new judicial rent cannot be fixed by agreement between landlord and tenant, it is equally at variance with the policy of the Act that an agreement between landlord and tenant should be sanctioned, whose object was to have the fixing of a new judicial rent left to the Land Commission, the County Court, or the Court of Arbitration. In my opinion this Court would have no jurisdiction, on the consent of

Land Com. 1893.

MURRAY, *Tenant;* SCOTTISH PROV. INST. *Landlords.*

Bewley, J.

landlords and tenants, to set aside orders made by Sub-Commissions in the year 1882, for the purpose of enabling the tenants to anticipate the expiration of the current statutory terms, and have their judicial rents fixed anew, and if no jurisdiction exists in such a case, I cannot see how it exists iu the present. The cases on the Peyton Estate, decided by Mr. Fitzgerald, and referred to on the motion in this case, have no application. There, as I understand, the agreements and declarations were taken off the file, on the ground that *ab initio* they were grossly fraudulent, and should never have been filed.

The agreements and declarations in the present cases are not alleged to be tainted with fraud, and are perfectly regular in form, and having been duly filed many years ago cannot now be taken off the file.

I may add that if the landlords and tenants in the present cases concur in thinking that there should be some abatement in the judicial rents, but cannot agree as to what the abatement should be, there is nothing to prevent them from leaving the amount of that abatement to be settled by two or more competent and impartial valuers.

Solicitor for the tenants: *D. C. Rushe.*

D. M'C. M.

GLOSTER *v.* MURPHY (1).

Q. B. Div. 1893.
Oct. 31.
Nov. 1, 2.

Landlord and tenant—Rent "including all taxes, charges, and impositions" "payable out of the premises"—Liability to local "improvement rate"—Limerick Improvement Act, 1853 (16 & 17 *Vict. c. cxciv.*)—*The Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34).

Under a lease of premises in the borough of Limerick, made in 1854, the *reddendum* stated the rent as £9 15*s.*, "including all taxes, charges, and impositions whatsoever," the lessor covenanting to pay "all taxes, charges, and other impositions which may become due and payable out of the said demised premises":—

Held, following *Palmer* v. *Power* (4 Ir. C. L. R. 191), that the lessee was not entitled to deduct the amount of the local "*improvement rate*" levied under the Limerick Improvement Act, 1853, and the Towns Improvement Clauses Act, 1847, such rate being a personal tax.

Palmer v. *Power* (4 Ir. C. L. R. 191) and *Barcroft* v. *Welland* (12 L. R. Ir. 35) considered.

CASE STATED pursuant to 27 & 28 Vict. c. 99, upon the hearing of a civil bill appeal, tried before Mr. Justice Gibson, at the County Limerick Summer Assizes, 1893.

The case stated was to the following effect:—

This was an appeal by the defendant from a decree of the County Court Judge of the County Limerick, dated 6th June, 1893, in a process to recover £9 15*s.*, one year's rent to 1st November, 1892, due out of certain premises in Limerick, held by the defendant, as assignee of a lease, dated 20th May, 1854, from George Gloster, the plaintiff's predecessor in title, to John Frawley.

The *reddendum* in this lease was as follows:—"Yielding and paying therefor and thereout during the said term (100 years) unto the said George Gloster (the lessor), his heirs and assigns, the yearly rent or sum of £9 15*s.*, to be paid half-yearly every 1st November, and 1st May in every year, during the term hereby

(1) Before SIR P. O'BRIEN, C.J., and HARRISON, HOLMES, and MADDEN, JJ.

Q. B. Div. 1893.

GLOSTER v. MURPHY.

granted, including all taxes, charges, and impositions whatsoever." The lease contained a covenant, on the lessee's part, well and truly to pay to the said George Gloster, his heirs and assigns, the said reserved yearly rent of £9 15*s.*, including all taxes as aforesaid, and on the part of the lessor the covenant following:—"And the said George Gloster doth hereby for himself his heirs and assigns, covenant and agree to and with the said John Frawley, his executors, administrators, and assigns, that he the said George Gloster, his heirs and assigns, shall and will during the term hereby granted well and truly pay, or cause to be paid, all taxes, charges, and other impositions which may become due and payable out of the said demised premises, and in case of nonpayment thereof by the said George Gloster, his heirs or assigns, that he the said George Frawley, his executors, administrators, and assigns, shall be at liberty to reimburse himself or themselves out of the yearly rent any sum which he or they shall or may have occasion to pay for or on account of said taxes."

The value of the premises had been increased from £5 10*s.* to £24 *per annum*, by certain additions made to the buildings thereon by the lessee.

The defendant claimed as against the rent to be entitled to credit for certain payments made by him during the current year:—(1), half poor rate, amounting to 17*s.* 10*d.*; (2), £6 for improvement rate, and; (3) £1 10*s.* for general purposes rate.

Counsel for defendant contended—1, that, as to all these items of deduction the lessor was, under the lease, liable to indemnify the lessee: *Barcroft* v. *Welland* (1); 2, that, under the statutes, the improvement rate and the general purposes rate were charged on the premises and must fall within the lessor's covenant.

The plaintiff, at the hearing of the appeal offered to allow the deduction of £1 10*s.* for the general purposes rate and half poor rate on the rent of the premises, and alleged that this had been offered in the Court below, though the decree was for the full amount sued for.

The learned Judge added that it was to be taken that the rates

(1) 12 L. R. Ir. 35.

were duly made and that they were duly paid by the defendant, the only question being whether the plaintiff was not bound to indemnify the defendant and stated, for the opinion of the Court, the question whether the defendant, on the true construction of the lease and of the statutes (16 & 17 Vict. c. cxciv.; 47 Geo. 3, c. lxxv.; 51 Geo. 3, c. civ.), was entitled to credit for any, and which, or what part, of the sums aforesaid paid by him and relied on by way of set-off.

At the hearing of the case stated, counsel for plaintiff only pressed the claim that the lessee was not entitled to deduct the account of the Improvement Rate.

The Limerick Improvement Act, 1853 (16 & 17 Vict. c. cxciv.), repeals (*section* 1) the two earlier local Acts, 47 Geo. 3, sess. 2, c. lxxv., and 51 Geo. 3, c. civ.; provides (*section* 39) that the Town Council shall raise and levy off the borough by means of a rate for general purposes, a rate for all purposes for which the Grand Jury theretofore was empowered to make provision; but in no case was this rate for general purposes, to be applicable to the making, enlarging, repairing, or paving any street, road, or passage within the borough; provides (*section* 57) that the provisions of the Towns Improvement Clauses Act, 1847, with certain exceptions (here immaterial) shall be incorporated in this Act; provides (*section* 77), for the purposes of defraying the expenses of carrying this Act and its provisions into effect (save such matters as came within the general purposes rate), that it shall be lawful for the Town Council "from time to time to make, assess, and levy (in lieu and stead of the rates which might have been" assessed and levied under the provisions of the recited Acts hereby repealed) such equal rate to be called "The Improvement Rate," as may be necessary for the purposes aforesaid, not exceeding in any one year 5*s.* in the pound on the net annual value of the property included in such rate; provides (*section* 80) for the issue of warrants of distress for the recovery of any rate payable under this Act by justices, who might "order that the costs of the proceedings for the recovery of such rate shall be paid by the person liable to pay the said rate," and might ascertain and include the amount in such warrant; provides (*section* 84) that nothing in this Act shall extend to imposing

Q. B. Div. 1893. GLOSTER v. MURPHY.

or levying rates upon any plot of ground laid out for building purposes thereon and which plot has not any building erected but is actually in waste; provides (*section* 85) that "no person shall be rated to any rate made in pursuance of this Act in respect of any church, chapel, and other exempted buildings.

The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), provides (*section* 167) that every rate made by the Commissioners under this and the special Act shall be made and levied by them . . . . upon every person who occupies any of the prescribed kind of property . . . . within the limits of the special Act, or of the district where such rate is assessed on the occupiers of lands and buildings of a separate district, as hereinbefore provided, according to the net annual value thereof; provides (*section* 180) that unoccupied buildings shall be rated, and that subsequent occupiers shall pay a portion of such rate proportioned to the time during which they have been in occupation.

The Local Act (47 Geo. 3, sess. 2, c. lxxv.) provided (*section* 48) that the Commissioners should direct and appoint the sum to be raised for improving the said parish, and should nominate three applotters, who should estimate the yearly value of the buildings within the parish, and applot the money to be raised and paid for the several purposes aforesaid by a proportionable poundage according to the real and actual value at which such houses and other premises should be valued, specifying in such applotment the names of the different persons inhabiting or possessing the same, subject and liable to pay the same; provided (*sect.* 51) that after such annual values should have been so ascertained, the Commissioners should "rate, assess, and charge" all such houses, buildings, &c., "with an annual rate or assessment . . . according to the annual value thereof"; provided (*section* 56) that the Commissioners should cause such rates and assessments to be collected and received . . . of and from the person or persons respectively on whom the same should be respectively rated, charged, or assessed; provided (*section* 57) that, the several and respective tenants in possession, or occupiers of all houses, &c., who should be rated by this Act were required to pay to the collectors such sum of money as should be rated upon such houses, buildings, &c., weekly and monthly tenants being allowed to deduct

from, and take credit out of, the rent payable to the owners the amount of rates that they might have paid; provided (*section* 58) that occupiers, ingoing and outgoing, should be respectively liable to pay the rate or assessment in proportion to the time that they were in possession or occupation of the premises; and enacted (*section* 69) that, in case of default by persons liable, owners or occupiers, a warrant might issue to levy the amount rated upon them by distress or sale of the goods and chattels of the party in default; and (*section* 60) that a tenant or occupier overpaying rates in discharge of the liability of the landlord or owner should be reimbursed therefor.

The Local Act (51 Geo. 3, c. civ.), amending the foregoing, enacted that for the purposes of the foregoing Act, and for other purposes, authorized by the Amendment Act and included thereby, the Commissioners should "rate, assess, and charge all buildings," &c., with an annual rate or assessment, not exceeding the sum of 3*s.* in the pound.

D. F. Browne (with him *D. B. Sullivan*, *Q.C.*), for the plaintiff:—

The plaintiff, while prepared to contend that the defendant's claim to deduct half poor-rates, and the amount of the General Purposes Rate, is untenable, is, however, willing, as he was willing in the Court below, to allow the defendant to make these two deductions, and confines this argument to the question of the Improvement Rate.

The Improvement Rate is not charged on the premises; it is a personal liability falling upon the occupier, and therefore does not come within the *reddendum*, or within the covenant in the lease; these include only charges upon the premises. *Palmer* v. *Power* (1) is a binding authority, directly in point. Indeed, the present case is stronger than the case of *Palmer* v. *Power* (1) (where the rent was reserved "over and above all taxes, charges, and impositions, whatsover, quit-rent and Crown-rent excepted"); for here the lessor's covenant speaks of "taxes, charges, &c., payable out of the demised premises."

(1) 4 Ir. C. L. R. 191.

Q. B. Div. 1893.

GLOSTER v. MURPHY.

The decision of Mr. Baron Dowse in *Barcroft* v. *Welland* (1) (where the rent reserved was £90, "including all rates and taxes"), if it be consistent with *Palmer* v. *Power* (2), is distinguishable.

The Towns Improvement Clauses Act, 1847, incorporated in the Limerick Improvement Act, 1853, makes such rates as the present a personal tax upon the occupier (see sections 167, 180).

The word "charge" occurs in the Local Act of 1811. Both these earlier Acts were repealed by the Act of 1853, and can hardly be relied upon; but they are consistent with the view that this always was a personal burden upon the occupier.

Grand Jury cess stands upon a different footing. It is a charge upon land: *Hussey* v. *Holmes* (3); and the Grand Jury Act (6 & 7 Wm. 4. c. 116, s. 153) gives a remedy against the land, which does not exist in this case.

W. F. Kenny (with him *George Wright, Q. C.*), for the defendant:—

This case is governed, not by *Palmer* v. *Power* (2), but by *Barcroft* v. *Welland* (1), and *Bradford* v. *Reid* (4). It is a tax, within the meaning of the covenant, payable out of, or in respect of, the premises, and must be borne by the lessor. The terms in which the personal liability to poor-rate is created are different, and the remedies are different (see 1 & 2 Vict. c. 56, ss. 61, 71).

The earlier Local Act expressly made the Improvement Rate a charge on the land; and it was obviously no part of the intention of the Legislature, in 1853, when changing the machinery by which these borough rates were to be assessed, to change the character and incidence of the tax.

D. B. Sullivan, Q.C., in reply.

[Counsel also referred to *Lally* v. *Concannon* (5); *Malton* v.

(1) 12 L. R. Ir. 35.
(2) 4 Ir. C. L. R. 191.
(3) 3 C. & D., C. C. 397.
(4) 12 Ir. L. T. R. 139. See, as to this case, the judgment of Monroe, J., in *Bradford's Estate*, 31 L. R. Ir. 364.—[REP.]
(5) 3 Ir. C. L. R. 557.

West (1); *Greene* v. *Thornton* (2); *Morrogh* v. *Hall* (3); *Scovell* v. *Gardiner* (4)].

Q. B. Div. 1893.

GLOSTER v. MURPHY.

Cur. adv. vult.

SIR P. O'BRIEN, C.J. :—

[Having stated the facts, continued :]

Nov. 2.

Were it not for the authority of decided cases, I should be prepared to hold that which I am sure any layman would hold, namely, that the words of the *reddendum*, "all taxes, charges, and impositions whatsoever," include all charges on the land, and all personal liability by reason of occupation of land; and, when I am forced by reason of decided cases to differ from the view which would present itself to the lay mind as reasonable, I feel uncomfortable, as legal technicality and subtlety are apt to lead to conclusions opposed to the actual intention of the parties to a document. The interpretation of these words has, however, been discussed and settled in the often quoted case of *Palmer* v. *Power* (5), which was decided upon a special case by a full Court of the Queen's Bench in the year 1854, and which this Court is bound to follow.

The headnote of that case is as follows :—"In a fee-farm grant, made since the passing of 12 & 13 Vict. c. 104 (Poor Law Amendment Act), the rent was reserved 'over and above all taxes, charges, and impositions whatsoever, quit rent, and crown rent, excepted'; and the lessee covenanted to pay the rent, 'clear, and above all taxes, charges, and impositions, as aforesaid':—*Held*, that such contract did not amount to a contract to forego the landlord's liability to a deduction for poor-rate, as it included charges on land only, and the poor-law rate is but a personal tax."

The judgment of the Court was pronounced by Lefroy, C.J., who said :—"The stipulation in this lease has received a well-known and long-established construction, but was it ever applied to poor-rate? It applies to things naturally proceeding out of, and charges on the land; the stipulation is as to charges on the land, not charges on the occupier; and, if the principle contended

(1) 12 Ir. L. T. R. 6; [Ir. R. 11 C. L. 525].
(2) 16 L. R. Ir. 381.
(3) 32 L. R. Ir. 216.
(4) 16 Ir. C. L. R. 318.
(5) 4 Ir. C. L. R. 191.

Q. B. Div. 1893.

GLOSTER v. MURPHY.

Sir P. O'Brien, C.J.

for were carried out, it would throw the payment of income-tax on the tenant—a mere personal tax, which poor-rate is. *Lally* v. *Concannon* (1) is quite in point, establishing that the poor-rate is not a charge on land. We are, therefore, of opinion that this covenant is not a contract rendering the lessor liable exclusively to poor-rate."

This decision is one to which reference is always made in cases of this kind, and one with which the bar is intimately familiar. It was a decision of a full Court of the Queen's Bench nearly forty years ago, and its well-established authority cannot be disregarded in this Court. But if the words in *Palmer* v. *Power* (2), "taxes, charges, and impositions whatsoever, quit rent, and crown rent excepted," include only charges on the land, the words of this lease, "taxes, charges, and impositions whatsoever," must mean the same. Indeed, the lease in the present instance leads more strongly to that interpretation than do the words in *Palmer* v. *Power* (2), for the lessor here covenants to "pay or cause to be paid all taxes, charges, and other impositions which may become due and payable *out of* the said demised premises." If there was any ambiguity in the *reddendum* (and having regard to authority, I must hold there is not), I think that we should try to read it consistently with the covenant; and the covenant here, as I said, points more clearly to charges on the land; it uses the words "payable *out of* the premises." The *reddendum* and covenant in this lease must, therefore, on the authority of decided cases, be taken to deal with charges upon the land, and not with personal liability arising by reason of the occupation of the land, a distinction which Mr. Baron Dowse (in whose remark I entirely concur), in *Barcroft* v. *Welland* (3), said was not "very intelligible to the lay mind."

The case is, as I said during the argument, a case of construction of a lease and of an Act of Parliament; and, having stated what construction must in my view be put upon the covenant and *reddendum* in the lease, namely, that they must be taken as conversant exclusively with charges on the land, I turn to consider the character of this Improvement Rate. Is it a charge

(1) 3 Ir. C. L. R. 557. (2) 4 Ir. C. L. R. 191. (3) 12 L. R. Ir. 35.

upon the land, or is it a personal liability arising by reason of occupation?

Some earlier local statutes were referred to during the argument. These were, however, repealed by 16 & 17 Vict. c. cxciv. The case must be dealt with under the Act of 1853, which purports now to regulate the incidence of this borough-rate. Section 77 gives power to make this rate; and section 57 incorporates the Towns Improvement Clauses Act. Section 77 authorizes the mayor, aldermen, and burgesses from time to time "to make, assess, and levy (in lieu and stead of the rates, which might have been assessed and levied under the provisions of the recited Acts hereby repealed), such equal rate, to be called 'The Improvement Rate,' as may be necessary for the purposes aforesaid." Is there, in the words of this section, "make, assess, and levy," anything pointing exclusively to a charge upon land? These are words which might be apposite enough for the imposition of a charge on land; but they are, in my opinion, equally apposite for the creation of a personal charge upon individuals—for the imposition of a rate, to be levied or raised from individuals. Even without referring to the Towns Improvement Clauses Act of 1847, incorporated in the Local Act, I think that some light will be thrown upon the matter by the terms of other sections of the Limerick Improvement Act.

Section 80 says that it shall he lawful for any justice, in issuing a warrant of distress for the recovery of any rate under this Act, to order the costs of the proceedings for the recovery of same "to be paid *by the person liable* to pay the said rate," pointing to a personal liability; and section 85 says:—"*No person* shall be rated to any rate made in pursuance of this Act, in respect of any church, chapel, &c.," showing that liability is cast on persons, not on the land or buildings.

It is proper to observe that section 77 does not use the word "charge"; but that, in the earlier local Act passed in 1811, and repealed in 1853, this word occurs, "rate, assess, and charge, all such houses, buildings, &c."

Turning now to the Towns Improvement Clauses Act of 1847, sect. 167 provides that rates under this or the Special Act shall be made and levied upon every person in occupation of the prescribed

Q. B. Div. 1893.

GLOSTER v. MURPHY.

Sir P. O'Brien, C.J.

kind of premises, and speaks of the rate being "assessed on the occupiers," clearly pointing to the distinction between a liability imposed upon persons, and a liability imposed on the land. So also sections 168 and 180 deal with a personal liability. Section 180 speaks of property in respect of which *any person is liable* as occupier, and provides that if a building is unoccupied, and a person goes into occupation he shall be personally liable to a portion of the rate, a provision upon which Mr. Browne, for the plaintiff, strongly relied.

In my view, these two Acts, the Local Act of 1853, and the Towns Improvement Clauses Act of 1847, incorporated therewith, point clearly to a personal liability by reason of occupation; and therefore the case is governed by *Palmer* v. *Power* (1). This Improvement Rate does not come within the *reddendum* or within the covenant; they are conversant exclusively with charges upon the land, while the rate is one of a personal character imposed in respect of occupation. There are practically as cogent reasons here for holding the Improvement Rate a personal liability as existed in *Palmer* v. *Power* (1) for holding poor-rate a personal tax. The plaintiff is, in my opinion, entitled to succeed.

HARRISON, J., concurred.

HOLMES, J.:—

The sole ground upon which I concur in the judgment of the Court is that I am unable to distinguish this case from *Palmer* v. *Power* (1). If I did not feel bound by the authority of that decision, I should rule without hesitation in favour of the defendant. The lease under which the defendant holds provides that the rent reserved was to include all taxes, charges, and impositions; and the lessor covenants that he will pay all taxes, charges, and impositions payable out of the premises. That the intention of the parties in these stipulations was that the lessee should be indemnified by the lessor against such a tax as the Limerick Improvement Rate, is made clear by the admitted fact that for a period of almost forty years this construction has been acted on. It seems to me, too, to be the natural meaning of the

(1) 4 Ir. C. L. R. 191.

language; I can find nothing to show that it is confined to taxes which constitute a charge or incumbrance upon the premises. In the *reddendum* the words used are "taxes, charges, and impositions," without any qualification. In the covenant the words are taxes, charges, and impositions, payable out of the premises," which is merely another way of saying payable in respect of the premises. If there was no authority to the contrary, I should hold that all rates assessed upon the lessee in respect of the premises, or by reason of his occupation thereof, are included.

But then comes *Palmer* v. *Power* (1), decided thirty years ago, and although frequently referred to, never overruled. There the *reddendum* of a fee-farm grant reserved a rent over and above all taxes, charges, and impositions—the very words used in the *reddendum* of the lease before us, except that "included" is substituted for "over and above." It was decided in that case that these words did not include poor-rates, because the stipulation must be construed as being confined to charges on the land and as not including charges on the occupier. It has been demonstrated by my Lord, and indeed it is practically admitted by counsel for the defendant, that the Limerick Improvement Rate cannot be distinguished in this respect from the poor-rate; and if this be so, how can *Palmer* v. *Power* (1) be distinguished from the present case? No doubt, in the former case, the construction was in favour of the tenant, and here it will be in favour of the landlord; but this is not a reason for giving to the same words a different meaning; nor can I say that the additional words in the covenant, "payable out of the premises," are sufficient to include taxes which would not have been covered by the *reddendum* if it stood alone. The authority of *Palmer* v. *Power* (1) has been often expressly recognised. In *Barcroft* v. *Welland* (2) Baron Dowse was obviously not much impressed by it, but he did not altogether dissent from it, as he found a difference in the language of the document before him which, as he thought, entitled him to disregard it. *Scovell* v. *Gardiner* (3) and *Greene* v. *Thornton* (4) are clearly distinguishable. Accepting the decision in *Palmer* v. *Power* (1), and applying it to the present case, I concur with the

(1) 4 Ir. C. L. R. 191.
(2) 12 L. R. Ir. 35.
(3) 16 Ir. C. L. R. 318.
(4) 16 L. R. Ir. 381.

Q. B. Div. 1893. GLOSTER v. MURPHY.

other members of the Court in answering the question that has been discussed before us in favour of the plaintiff.

MADDEN, J.:—

I am also of opinion that this case is governed by *Palmer* v. *Power* (1), and that we should follow that decision. It is possible that, if a covenant such as that in *Palmer* v. *Power* (1) were to come now before this Court for the first time, it might receive a different construction. But *Palmer* v. *Power* (1) was decided in strict accordance with the principles which then governed courts of construction, in obedience to which they were used to cut down and control general words by a consideration, not only of the nature of the instrument in which they occurred, but of individual words with which they happened to be associated. *Noscitur a sociis.* The decision in *Palmer* v. *Power* (1) is clearly founded on the principle that the word "taxes" occurring in an instrument dealing with land, and found in company with the word "charges," ought to be restricted to taxes charged upon land. I consider that *Barcroft* v. *Welland* (2) can very well stand with *Palmer* v. *Power* (1) thus understood; for the associated word "charge," which was supposed to affect the character of its companions, did not there occur; and Mr. Baron Dowse therefore felt himself at liberty to give to the general words "all rates and taxes" their natural meaning. In my opinion, no rule of construction has in its practical application oftener defeated the intention of the parties to instruments than that known as *noscitur a sociis.* Happily, courts of construction have gradually emancipated themselves from its tyranny, if indeed it can be considered to have survived recent decisions on the construction of wills. But, whatever might be my view, if we were at liberty to apply the more enlightened principles of construction which now prevail, it must be borne in mind that *Palmer* v. *Power* (1) has regulated contracts and rights for over thirty years. It has become part of the property law of this country, and must be followed by this Court.

Solicitors for the plaintiff: *Dundon & Doyle.*
Solicitor for the defendant: *F. Kearney.*

A. E. R. J.

(1) 4 Ir. C. L. R. 191.

(2) 12 L. R. Ir. 35.

RONAN *v.* KING (1).

(1893. No. 1460.)

Q. B. Div.
1893.
Nov. 9, 13.

Sale by sheriff under a writ of fi. fa.—*Tenancy from year to year—Sale of judgment-debtor's "chattel interest (if any)"—Sale of a speculation—Effect of existence of outstanding legal mortgage—Notice—Deposit paid—"Failure of consideration."*

Where a sheriff, under a writ of *fi. fa.*, seized and set up for sale "the chattel interest (if any)" of an execution-debtor in a tenancy from year to year, giving full notice to intending purchasers of the fact that it was alleged that there was a legal mortgage thereon outstanding, but without inquiring further into the existence or validity of such alleged mortgage—the purchaser, though it subsequently was proved that the mortgage was a valid and legal one, was held not to be entitled, upon rescission before conveyance, to recover the amount of his deposit as paid upon a consideration that had failed: the transaction being, not an attempted sale of an equity of redemption, but a sale of a speculation merely.

Griffin v. *Caddell* (Ir. R. 9 C. L. 488) and *Kearney* v. *Ryan* (2 L. R. Ir. 61) considered.

New Trial Motion of action tried before Mr. Justice Holmes and a common jury in Trinity Sittings, 1893.

The plaintiff claimed £70, as money had and received, money paid for a consideration that had failed, and money found due on accounts stated and settled—being the amount paid on the 10th September, 1892, by the plaintiff to the defendant (the High Sheriff of county Roscommon) for the chattel interest of Stephen Ronan in a holding in the county Roscommon, which chattel interest the defendant had no right to sell; and, in the alternative, claimed to recover the said amount on the ground of fraudulent misrepresentation, averring that in consideration that the plaintiff would purchase the said chattel interest, the defendant undertook that he did not know he had not a right to sell the said interest,

(1) Before Harrison, Gibson, and Madden, JJ.

Q. B. Div. 1893.

RONAN v. KING.

on the faith of which undertaking the plaintiff bid for it, and was declared the purchaser, and paid the purchase-money; yet, in truth and in fact, the defendant had no right to sell the said interest, as the defendant then well knew, and by reason thereof a good title could not be made, and the sale and purchase could not be completed.

The defendant (after traversing the averments of the claim) pleaded—(par. 10) that he did not know that he had no right to sell said interest; (par. 11) that, admitting that the defendant had no right to sell said interest, the plaintiff, when he made said bid and paid said money, had full knowledge that the defendant had no right to sell said interest, and that there was no fraud, concealment, or deceit on his part; and (par. 12) that, at the times mentioned, the defendant was sheriff of county Roscommon, and, in September, 1892, in obedience to a writ of *fieri facias* in the action of *Neary* v. *Stephen Ronan*, the defendant seized the chattel interest (if any) of the said Stephen Ronan, and, as such sheriff and not otherwise, sold; and the plaintiff bought such chattel interest (if any), subject to certain conditions and particulars of sale; and that the defendant duly performed, and was ready and willing to perform, his agreement with the plaintiff, and had acted in the premises *bona fide*, without fraud, concealment, or deceit, and in the due discharge of his duty as such sheriff. The plaintiff joined issue.

At the trial evidence was given on behalf of the plaintiff, a son of the judgment-debtor in the action of *Neary* v. *Ronan*, to the effect that he heard the sub-sheriff read the conditions of sale at the auction, and that the sheriff stated at the time that he had received a notice that one Michael Hunt had a mortgage on the farm. This Michael Hunt, an uncle of the plaintiff, came to Roscommon the evening before the sale. Plaintiff spoke to him, and told him about the sale. Hunt was present at the sale, but the plaintiff did not ask him whether he had a mortgage or not. Plaintiff borrowed the purchase-money from a man named Burke, not from Hunt; but Burke was repaid the £70 by Hunt or his son. A legal mortgage of the farm in question, dated 25th June, 1891, from Stephen Ronan to Michael Hunt was put in evidence; also documents which suggested that though Stephen Ronan was

in actual occupation as tenant, and was recognized as tenant by the landlord, and had had a fair rent fixed in his own name, he might possibly, in equity, be held to be a trustee for others of his family.

The conditions of sale which were put in evidence, and which are set out with sufficient fulness in the judgment of Harrison, J., were of the sale of "the chattel interest (if any)" of the execution debtor. No conveyance had been executed by the sheriff, nor any tendered for execution.

At the close of the plaintiff's case Mr. M'Laughlin, Q.C., for the defendant, asked for a direction, and (in reply to the learned Judge) stated that he did not desire to give any evidence, or to have any questions submitted to the jury. By consent the jury was then discharged, the issue-paper being signed in blank; and, after argument on a subsequent day, the learned Judge directed a verdict and gave judgment for the plaintiff, stating in his report that the cases of *Griffin* v. *Caddell* (1) and *Kearney* v. *Ryan* (2), cited by counsel, did not seem to be in point; the defendant, by his sub-sheriff, had agreed to sell the chattel interest (if any) of S. Ronan in the lands; S. Ronan was entitled to a chattel interest therein, but the sheriff, by reason of the mortgage, could neither seize, sell, nor convey it; there therefore seemed to him to be a failure of consideration; and, as there had been no conveyance executed, he was of opinion that the plaintiff could recover the purchase-money. The learned Judge accordingly directed a verdict for the plaintiff, and gave judgment for him, adding, in his report, that neither the judgment nor the writ of execution under which the sheriff purported to sell, was given in evidence.

The defendant now moved to have the judgment so entered set aside, and judgment entered for him, or for a new trial on the grounds of misdirection or surprise (3).

(1) Ir. R. 9 C. L. 488. (2) 2 L. R. Ir. 61.

(3) The defendant, subsequently to the service of the notice of motion, filed an affidavit referring to the course of the trial, which was used without objection upon the new trial motion. This affidavit stated (*inter alia*) that the amount paid by plaintiff on the sale had been paid over to the execution-creditor, before repudiation of the contract by the plaintiff, and before the defendant had any notice of such repudiation.

Q. B. Div. 1893.

RONAN v. KING.

Ronan, *Q.C.*, and *Henry Richards*, for the defendant :—

The case is governed by *Griffin* v. *Caddell* (1). *Kearney* v. *Ryan* (2) is distinguishable on the facts; and the opinions of three of the four judges in the Court of Appeal are expressly in the defendant's favour. In that case the purchase-money was still in the sheriff's hands, in the present it had been paid over to the execution-creditor before notice. The alleged mortgage must, for the purposes of this argument, be assumed to be valid; but if it had proved to be non-existent or invalid, the sheriff in refusing to sell would have rendered himself liable to an action. The sheriff acted in the discharge of his duty, fairly and openly; notice of the alleged mortgage was given to the purchaser (who, besides, in this case was manifestly acting for, and identified with, the execution creditor and the mortgagee), and he must be taken to have bought a chance merely, and the plaintiff is not entitled to recover. See also *Chapman* v. *Speller* (3); *Tennent* v. *Robinson* (4). [Counsel also referred to *Bos* v. *Helsham* (5), and *Palmer* v. *Johnson* (6).]

O'Shaughnessy, *Q.C.*, and *Molony*, for the plaintiff :—

Griffin v. *Caddell* (1) is distinguishable. A conveyance had there been executed; and the sheriff in conveying the "interest (if any)" purported to convey, and the purchaser knew that he was purporting to convey, a lease for lives. Here the purchaser has rescinded before conveyance, and the words "chattel interest (if any)" must be taken to mean the debtor's interest, if same be a term of years, and not a freehold. The debtor had a chattel interest, but one which could not be seized or sold owing to the legal mortgage outstanding thereon.

The sheriff, having notice of the mortgage, could have stayed his hand pending investigation (*Re Bryant* (7)) without incurring liability, and was bound to make inquiries. [MADDEN, J., What inquiries was he to make?] He must be taken to have known (what would amount in law to fraud) that he had nothing to sell, or to have assumed that the mortgage was invalid. If the sale was carried out on that assumption, the purchaser was entitled to rescind. The

(1) Ir. R. 9 C. L. 488.
(2) 2 L. R. Ir. 61.
(3) 14 Q. B. 621.
(4) 2 Ir. C. L. R. 142.
(5) L. R. 2 Ex. 72.
(6) 13 Q. B. Div. 351.
(7) 4 Ch. Div. 98.

facts of *Kearney* v. *Ryan* (1) are similar to those of the present case, and the decision is in favour of the plaintiff.

The sheriff is like any other vendor. [GIBSON, J.: The law did not throw upon the sheriff the duty of deciding one way or the other upon the validity or invalidity of the mortgage. He went on with the seizure, cautioning those who were bidding at the sale.] Then the sheriff would never be liable to refund, and *Kearney* v. *Ryan* (1) must be wrongly decided. [GIBSON, J.: By what use of the English language can the sheriff protect himself if not by the words here used?] No matter what form of words are used, a purchaser may recover his purchase-money, if there is a failure of consideration, certainly before conveyance. [MADDEN, J.: That need not be so, even in the case of an ordinary vendor, if the condition be explicit that a chance only is being sold.]

Henry Richards, in reply.

[Counsel also referred to *Peto* v. *Blades* (2), and *Murphy* v. *Sandes* (3).]

Cur. adv. vult.

HARRISON, J.:—

Nov. 13.

In this case a motion has been made on behalf of the defendant that the judgment entered by Mr. Justice Holmes on the trial of this action should be set aside, and that judgment should be entered for the defendant.

The action was tried in the last Trinity Sittings. It was brought to recover the sum of £70, for money alleged to have been had and received by the defendant for the use of the plaintiff. The defendant was high sheriff of the county Roscommon in the year 1892; and, a judgment having been recovered in an action by one Thomas Neary against one Stephen Ronan, the defendant, by his under-sheriff, Mr. James, under a *fieri facias* in said action, in the month of July, 1892, purported to seize the interest of the defendant in a farm of land held under one Abraham Logan, as tenant from year to year, at the yearly rent of £7 10*s*.

(1) 2 L. R. Ir. 61. (2) 5 Taunt. 657. (3) Ir. R. 10 C. L. 309.

Q. B. Div. 1893.

RONAN v. KING.

Harrison, J.

On the 4th of July, Mr. Sheridan, the plaintiff's solicitor, served a notice upon the sub-sheriff, alleging that the farm had been mortgaged by Stephen Ronan to one Michael Hunt, and cautioning him against selling said farm.

On the 10th of September the sub-sheriff put up for sale at the Courthouse, Roscommon, "such chattel interest (if any)" as the defendant had in said farm. There were seven conditions of sale, of which Nos. 1, 2, and 7 are important. At the sale the sub-sheriff stated that he had a notice from Michael Hunt, and that Hunt claimed to have a mortgage on the place.

The plaintiff, who is a son of Stephen Ronan, the defendant in said execution, with whom he resided, bid £70, and was declared the purchaser. He borrowed the money in the town, and paid it to the sub-sheriff. The plaintiff signed the conditions of sale, and he admitted that he heard them read. He also stated that Michael Hunt, the alleged mortgagee, was his uncle (his mother's brother); that he had met him in the street the day before, and told him the place was to be sold the next day; that Michael Hunt was at the sale; and that, when the sub-sheriff said that Hunt claimed to have a mortgage, he (plaintiff) did not ask him (Michael Hunt) whether he had a mortgage or not, and that he (plaintiff) did not know anything about the mortgage.

At the trial, amongst other documents, the mortgage to Michael Hunt from Stephen Ronan, dated the 25th June, 1891, was read on behalf of the plaintiff.

No assignment or conveyance was executed by the sheriff to the plaintiff, nor was any change of possession proved.

No questions were asked by the counsel on either side to be submitted to the jury; and the learned Judge, having taken a few days to consider, entered a verdict and judgment for the plaintiff. In his report he states his grounds for so doing as follows:—"In this action, the defendant by his sub-sheriff agreed to sell the chattel interest (if any) of Stephen Ronan in the lands. Stephen Ronan was entitled to a chattel interest therein; but the sheriff, by reason of the mortgage, could neither seize, sell, nor convey it. There seemed, therefore, to me to be a failure of consideration, and as there had been no conveyance executed, I was of opinion that the plaintiff could recover the purchase-money. I accordingly

directed a verdict for the plaintiff, and gave judgment for him. Neither the judgment nor the writ of execution under which the sheriff purported to sell was given in evidence."

A letter was proved at the trial from Mr. Sheridan, the plaintiff's solicitor, to the high sheriff (the defendant), dated the 11th October, 1892, in which Mr. Sheridan stated that he was instructed by Mr. P. J. Hunt (1) to institute legal proceedings against the high sheriff for recovery of the sum of £70, paid to him on the 20th September last, when the high sheriff purported to sell him, under a writ of *fi. fa.*, the interest of one Stephen Ronan in a farm of land, which at the time the high sheriff was aware he had no right to sell or convey, and threatening legal proceedings if a cheque for the amount were not sent, and cautioning the high sheriff against parting with the purchase-money.

The present action was commenced on the 9th February, 1893; and the question for our determination is whether, upon the above facts, the learned Judge was right in entering the verdict and judgment for the plaintiff, or whether the defendant is entitled to succeed. I am of opinion that the defendant is entitled to have the verdict and judgment entered for him.

The question depends on what was the contract entered into between the plaintiff and the sub-sheriff, having regard to the conditions of sale, and to the fact that the defendant here is a sheriff who by the law has certain duties and responsibilities imposed upon him in the execution of writs of *fieri facias*.

The first condition of sale expressly states that the premises were sold "for such chattel interest (if any) as the defendant may have under the tenancy recited therein." The second condition provides, "that the sheriff will not covenant for title, but shall assign such chattel interest only (if any) as the defendant may have in the premises; and the purchaser will not be entitled to any evidence of the defendant's title, and will be bound to accept the statements herein contained at his own risk"; and the 7th condition states that the sheriff will not hold himself responsible in any way whatever in relation to any matter or thing connected with the sale of the foregoing holding,

(1) P. J. Hunt was a son of Michael Hunt, the alleged mortgagee, and would appear to have acted in this on his father's behalf.—[REP.]

Q. B. Div. 1893.

RONAN v. KING.

Harrison, J.

being acting in his official capacity only, discharging his duties as sheriff, but not otherwise.

There is and can be no dispute what those duties are. The sheriff can only seize and sell a chattel interest in lands of a legal nature. He has no power to seize an equitable interest, but he is bound to seize any legal chattel interest. Here the sheriff was served with a notice on the 4th July, 1892, signed by a solicitor, stating that Michael Hunt had a mortgage upon the farm; but he finds the defendant in the execution in possession, and he proceeds, on the 10th September, to put up for sale "such chattel interest (if any) as the defendant may now have" under the tenancy recited in the conditions of sale—stating at the sale that he had got a "notice from Hunt, and that Hunt claimed to have a mortgage on the place."

There was, therefore, no fraud, misrepresentation, or concealment on the part of the sheriff; and I am of opinion that any person who purchased at said sale took his chance of the defendant having a legal chattel interest in the farm. Having paid over his purchase-money for such interest if it should turn out to exist, he cannot afterwards recover back his purchase-money upon it being ascertained that the defendant in the execution had not any legal chattel interest in the lands.

In the case of *Kearney* v. *Ryan* (1) it was found by the verdict of the jury, at the trial before the late Chief Justice Monahan, that the sheriff had sold a subsisting term in the lands of the execution-debtor; and, as it was proved that no such term existed, the purchaser was held entitled to recover his deposit. The sheriff there put up for sale "the defendant's interest in part of the lands of Knocklong," and the jury found, in answer to the question submitted to them by the learned Chief Justice, that what the sheriff sold at the sale was a subsisting term in the land. The Lord Chancellor, in giving judgment, at page 68, says:—"The jury have found that what the sheriff sold at the sale was a subsisting term in the land, on the supposition that M'Cormack's [the original tenant's] interest was vested in Power [the execution-debtor]. I understand it to be suggested

(1) 2 L. R. Ir. 61.

that what he sold was Power's interest, no matter what it was, in the land. The finding of the jury binds us; but, if it had been as it is suggested that it ought to have been, I should still be of opinion that the sheriff must restore this deposit, which it is admitted he has fortunately retained in his own possession."

This is, no doubt, an expression of his Lordship's opinion on the facts of that case, which would be adverse to the defendant in the present action; but Chief Justice May, and Christian, L.J., intimate a different opinion on the point. At page 73 the Chief Justice says:—"If a sheriff or an assignee in bankruptcy off-hand offer for sale merely such interest (if any) as the execution-debtor, or bankrupt, might be found to have in certain lands, clearly informing intending purchasers that such title should be taken with all defects, the purchaser might be held bound to complete, notwithstanding any defect which might, after a sale, be shown to exist in such title." And Christian, L.J., says, at page 75:—"Without that finding [viz. that the sheriff had really sold a subsisting term in the land], I think it would be far from being free from doubt; for, if the subject of the sale had been to the apprehension of both parties, what was insisted by the defendant's counsel—that is to say, Power's interest, whatever it was, more or less, anything or nothing, so that the plaintiff knowingly purchased a speculation— . . . if this was the thing which had been sold and bought, why then, as the plaintiff would have deliberately taken his chance, and could have got what he bargained for, I should see great difficulty in holding that he could receive back his deposit in this action for money had and received for his use, on the ground of a total failure of consideration."

In the present case the sheriff expressly purported to sell such chattel interest (if any) as the defendant in the execution now has in the lands, and the conditions provide that the sheriff will not covenant for title, but shall assign such chattel interest only (if any) as the defendant may have in the premises; and the plaintiff admits that the sheriff stated at the sale that he had got a notice from Hunt (the mortgagee), and that Hunt claimed to have a mortgage on the place.

The defendant had thus clear notice that such a claim was made, and I am of opinion that, to use Lord Justice Christian's

Q. B. Div. 1893.

RONAN v. KING.

Harrison, J.

expression, "he knowingly purchased a speculation"; he deliberately took his chance, and cannot now receive back his purchase-money.

I do not see how the sheriff could have guarded himself otherwise than he did. It is stated, in the affidavit of the sub-sheriff, made to ground this motion, "that the sum paid by the defendant was duly paid over to the execution-creditor before the commencement of this action, and before he had received any notice that the defendant repudiated the purchase, or that he did not intend to complete the same."

I am, therefore, of opinion that the defendant is entitled to succeed in the present action, and to have the verdict and judgment entered for him.

As regards the last paragraph in the report of the learned Judge, that "neither the judgment nor writ of execution, under which the sheriff purported to sell was given in evidence"—no objection was made on this ground by the plaintiff's counsel at the trial, nor was this referred to during the argument, or relied on as entitling the plaintiff to a new trial, or as any objection to the defendant being entitled to succeed.

GIBSON, J.:—

Though a vendor is not permitted to mislead a purchaser, or to convey that a title, to his knowledge certainly bad, is not accurately known, it is well settled that he can by clear and explicit conditions preclude a purchaser from objections: *Rosenberg* v. *Cook* (1), and compel such purchaser to accept such title as the seller may be able to convey: *Wilmot* v. *Wilkinson* (2); *Corrall* v. *Cattell* (3). There is nothing to prevent parties entering, with their eyes open, into a contract for the sale and purchase of a mere speculative chance. Thus, in *Freme* v. *Wright* (4), the plaintiffs, who were assignees in bankruptcy, were held entitled to a decree for specific performance of a contract for the sale of the bankrupt's interest, "under such title as he lately held the same." A previous sale had proved abortive, owing to the title being defective. At the sale the auctioneer explained that the auction was a re-sale,

(1) 8 Q. B. D. 162, (C. A.).
(2) 6 B. & C. 506.
(3) 4 M. & W. 734.
(4) 4 Mad. 364.

and that the purchaser was not to expect a good title, but to take it as it was. The judgment of the Court appears not to be founded on this circumstance, but to proceed upon the frame of the conditions of sale, which showed that the purchaser was entering into a speculative bargain. It is, however, clear that, even in the absence of special conditions, where there is no express contract as to title, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by showing that the purchaser had notice before the contract that the vendor *could* not give a good title: *Re Gloag's Contract* (1).

In the present case, the vendor was a sheriff who *prima facie* was not bound to give any engagement of title; the contract explicitly excluded any representation or inference of good title; and the purchaser, who was distinctly apprised of the mortgagee's notice, had quite as good an opportunity as the sheriff of forming a judgment of the danger arising from that source. The parties contracted on equal terms, and it is argued with force that the case falls within the *dicta* of Christian, L.J., Deasy, L.J., and May, C.J., in *Kearney* v. *Ryan* (2). The purchaser cannot get rid of his bargain merely because the speculation did not turn out to his advantage. The price he gave was measured by the risk he was willing to accept.

On behalf of the plaintiff, the argument mainly went on the view thrown out by my brother Holmes at the trial, in which I am not able to agree. The chattel interest (if any), the subject of sale referred to in the contract, meant, in my opinion, a legal interest, capable of being seized under *fi. fa.* The interest which the judgment-debtor had was something quite different,—an equity of redemption which could not be seized or sold. I cannot see that the plaintiff is in a better position for the purpose of rescission than if Ronan the debtor had had a freehold interest, or no interest at all. The use of the word "chattel" cannot affect the result. If the word was omitted, the word "interest" standing alone would by implication import an interest legally seizable, which could only be a chattel interest.

Other points were suggested rather than argued, which, on account of the importance of the case to sheriffs, it is proper that I

(1) 23 Ch. Div. 320. (2) 2 L. R. Ir. 61.

Q. B. Div. 1893.

RONAN v. KING.

Gibson, J.

should notice. It was put that the sheriff must be taken to have known that Ronan only had an equity of redemption, and that he acted in an illegal and misleading manner in selling, as the purchaser was buying, not the possibility, but what the sheriff knew was the certainty, of loss. If the sheriff knew and believed as a matter of certainty that the interest was an equity of redemption which could not be legally seized or sold, the argument would require consideration, and the case of *Smith* v. *Harrison* (1) might have an important bearing on the question. There the purchaser at a sheriff's sale of the chattel interest (if any) of the judgment debtor bought under conditions which provided that, even if the debtor had no interest, the purchaser should not be entitled to compel the sheriff to refund. The action was brought by the purchaser against the execution-creditor, who was responsible for the sale, knew that the debtor's interest was valueless, and himself bid at the auction. The plaintiff was held entitled to relief, on the ground that the execution-creditor knew, while the purchaser did not, that there was in fact nothing to sell. The purchaser was led to think he was buying a speculation, when he was only acquiring certain loss. The Court proceeded on the special facts connected with the conduct of the execution-creditor; and the reasoning is rather adverse to the idea that, but for those special circumstances, the plaintiff could have succeeded. The action here is against, not the execution-creditor, but the sheriff, a ministerial officer who, having in ordinary course of duty seized an apparent chattel interest, was not in a position to decide as to the validity or invalidity of the mortgagee's notice, claiming not only the land but the stock. Had he withdrawn the execution he might have incurred serious responsibility. It is said he should have made inquiries. The conclusion, however, at which he might arrive would not protect him as against the creditor in abandoning, or as against anyone else in adhering to, the execution. He communicated the notice to the plaintiff, who from his position ought to have been as well qualified as the sheriff to estimate the possible truth and consequences of the claim. The sheriff seems to have acted in the ordinary course: the presumption is in favour of legality, and I am not at liberty, on a point not even put to the jury, to draw a

(1) 26 L. J., Ch. 412.

speculative inference that the sheriff was guilty of wilful misconduct and violation of duty in selling what he knew was not the subject of seizure.

Alternatively, it was suggested that, as the contract relates to a legal chattel interest, capable of seizure or sale, the sale must be taken, as between the sheriff and the purchaser, to have hinged on the assumed invalidity of the mortgage; and that, when the assumption was found to be mistaken, the plaintiff was entitled to rescind. If this argument of mistake was well-founded, the purchaser could in every case get redress, notwithstanding completion, as the equitable relief based on mistake is not affected by a conveyance being taken where the mistake continues. What the sheriff sold was a speculation, without assuming one way or the other that the mortgagee's claim was good or bad.

I have thought it right to consider whether the case could be brought within the principle laid down in Story's Equity Jurisprudence, sect. 143, that, where the subject-matter of sale is non-existent, the purchaser can be relieved on the ground that it would be unconscientious for the vendor to retain the purchase-money where the consideration wholly failed. If this were so, the result might not be affected even by completion, at least where the conveyance was taken in ignorance of the truth. In a case like the present the principle referred to does not apply. A speculative title was sold fairly; both parties were on equal terms; and the fact that the title turns out to be bad, and the purchase valueless, does not justify rescission. The insecurity of the purchase was probably discounted in the price.

With regard to the alleged omission to prove that the sheriff had paid over the purchase-money—if that was a relevant fact—I doubt that there was any case of surprise; but the point was scarcely argued, and in my view it is not necessary to consider it.

The learned Judge, at the end of his report, I observe, mentions, incidentally, that the judgment and *fi. fa.*, on which the sheriff acted were not proved. No argument or remark was addressed to the Court on this point; and from the course of the trial and discussion it must now be assumed that there was a legal execution.

Q. B. Div. 1893.

RONAN v. KING.

Gibson, J.

Conceivably, some questions might have been sent to the jury; but neither party asked this. Drawing reasonable inferences, I think the case is governed by the opinions indicated by the majority of the Court of Appeal in *Kearney* v. *Ryan* (1), which the appellate tribunal may overrule, but which this Court cannot disregard.

MADDEN, J. :—

This case depends on the construction of the contract embodied in the particulars and conditions of sale. The legal principles involved are clear beyond doubt. Under an open contract for the sale of land the vendor is bound to make title to a legal estate in fee-simple, in possession, free from incumbrances. He may, however, by clear and unambiguous words, guard himself against responsibility for defect in the title, or stipulate for the sale of some lesser interest. I am aware of no legal principle forbidding a vendor to sell the chance of his being able to convey some interest in land; but in such a case it must be clear beyond reasonable doubt that the purchaser is precluded by his contract from raising any question as to the existence of any estate in the vendor at the time of the contract. A mortgagee, for example, may have advanced money on the speculation that his mortgagor had an estate in Blackacre, and he may, in his turn, sell this speculation to a purchaser under his power of sale. Should the speculation turn out unfortunate, there is no failure of consideration. The purchaser gets what he bargained for, but it has turned out to be worthless. It is not correct to say that the subject-matter is non-existent, for the subject-matter is the speculation, and nothing else. No case directly in point as regards this question has been cited; but the case of *Smith* v. *Harrison* (2), referred to by my brother Gibson, and the *dicta* in *Kearney* v. *Ryan* (1), appear to assume the validity of such a contract.

In considering such cases with regard to failure of consideration, the test is (in the language of Parke, B., in *Ashworth* v. *Mounsey* (3)), " whether or no the defendant (the vendor) has done all that he ought to have done in pursuance of the contract contained in the conditions of sale." There would be

(1) 2 L. R. Ir. 61. (2) 26 L. J. Ch. 412. (3) 9 Ex. at p. 187.

no difficulty in applying these principles to a sale by a sheriff—in whose case, indeed, they are specially needed—even in the absence of the *dicta* to be found in the judgments of May, C.J., and Christian and Deasy, L.JJ., in the case of *Kearney* v. *Ryan* (1).

What, then, was the subject-matter of sale in the present case? Was it the equity of redemption vested in the execution-debtor, or was it the chance of acquiring a legal interest seizable under the writ of *fi. fa.*, and capable of being conveyed by the sheriff? If the former, the vendor has failed to make good his part of the contract; if the latter, the purchaser has had his chance, and there is no failure of consideration. I am of opinion that the latter is the true construction of the contract. The sheriff and the purchaser must be taken to have known that a legal interest only can be seized under the writ. Furthermore, the interest offered for sale is expressly stated in the contract to be the interest seized under the writ of *fieri facias*, that is to say a legal interest. No doubt, in the description of that interest, the word "chattel" occurs, and, before treating that word as surplusage, we are bound to see whether we can assign to it any reasonable meaning. The learned Judge has read the words "chattel interest" as referring to the equity of redemption vested in the execution-debtor, which is undoubtedly a chattel interest. But I cannot adopt this view, having regard to the fact that the subject-matter of the sale is described in the contract as having been seized under the writ, and also to the consideration that this construction renders the contract an illegal one: *Moher* v. *O'Grady* (2). I feel myself compelled to treat the word "chattel" as surplusage, and to construe the contract as one for the sale of the legal interest of the execution-debtor seized under the writ, if any such interest there was at the date of the contract. The plaintiff's case is that there was, in fact, no such interest in existence. In my view of the contract, applying the test prescribed by Parke, B., there was no default on the part of the vendor, and no failure of consideration.

Solicitor for the plaintiff: *W. T. Sheridan.*

Solicitors for the defendants: *Goodbody & Tisdall.*

A. E. R. J.

(1) 2 L. R. Ir. 61. (2) 4 L. R. Ir. 54.

Q. B. Div.
1893.
Oct. 27.

M'BRIDE *v.* M'BRIDE (1).

(No. 1593. 1893.)

Costs (party and party)—Action involving question of title—Employment of second senior counsel at jury-trial at Assizes.

Where nominal damages (exceeding the limit within which the Judge's certificate for costs is required) are recovered in an action involving a question of title, the amount recovered cannot be taken as the measure of the importance of the action.

Motion to review taxation.

The action, which was brought to recover damages for trespass, and for the illegal and excessive user of a right of way by the defendant over the plaintiff's land, was tried at Belfast at the Antrim Spring Assizes, 1893, before Mr. Justice Madden and a common jury, when verdict and judgment were entered for the plaintiff for £6 13*s.* 4*d.* and costs. The case lasted two days.

The plaintiff now applied to review the taxation, as between party and party, of his costs, by Master Coffey, in respect of the following matters:—

(*a*) Upon the fee to counsel on case to direct proofs, £3 3*s.*, the Master had disallowed £1 1*s.*; and, upon objection taken, had noted on the bill, "small case; overrule [objection]."

(*b*) The Master had disallowed the fee, and refresher, on brief to a second senior counsel on the trial, and items of costs in connexion therewith; and, upon objection taken, had noted, "disallowed one counsel; considered two counsel sufficient; plaintiff recovered £6 13*s.* 4*d.*"

(*c*) The Master had disallowed fees to counsel upon consultation, and items of costs connected therewith; and, overruling plaintiff's objection, had noted, "not a case, in my judgment, for a consultation, and the damages assessed £6 13*s.* 4*d.*"

(1) Before Harrison, Holmes, and Madden, JJ.

Campbell, Q.C. (with him *A. H. Bates*), for the plaintiff:—

The action involved questions of valuable rights; and the damages awarded were not a measure of its importance. In fact, the verdict would have been for nominal damages, except that other elements entered into the case. [MADDEN, J.: The case was heard before me. There was a considerable conflict of evidence, and the case lasted more than one day. I should have been prepared to give certificates had they been necessary.] The Master has disallowed one guinea upon the case for proofs, and other items, not in his mere discretion, but upon a principle, boldly stated, that the importance of such actions can be measured by the damages recovered. This is not an act of discretion mistakenly exercised, but an error in principle, and the Court will interfere. As to the consultation, the taxing officer is bound by the opinion of senior counsel, if the latter has advised a consultation.

For the convenience of the public, and at their request, and for the convenience of the jurors, the former practice at Assizes in Belfast has been altered; and the common jury cases are now tried in both Courts at the same time; it would, therefore, be a risk and an imprudence in a litigant or his solicitor to employ in a case of importance only one senior counsel, who might find that he was engaged in two cases both at hearing at the same time. The practice has certainly been to employ two seniors in cases of any magnitude.

There was no appearance for the defendant.

THE COURT, being of opinion that a question of title was involved, and that therefore the amount recovered in the action did not render the case a small or unimportant one, ordered that the taxing officer should review his taxation of said bill of costs, and that he should allow the items in question.

Solicitor for plaintiff: *A. J. Lewis.*

A. E. R. J.

Q. B. Div. 1893. June 28.

M'HUGH, Appellant; M'GRATH, Respondent (1).

Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *sect.* 17—42 & 43 *Vict. c.* 30, *s.* 5—*Butter exposed for sale in bulk—Right of authorized officer to purchase a small quantity for analysis.*

Section 17 of the Food and Drugs Act, 1875, applies to articles of food, &c., exposed for sale by wholesale as well as by retail.

Case stated, pursuant to the provisions of 20 & 21 Vict. c. 43, for the opinion of the Queen's Bench Division, at the request of the complainant, by Mr. R. Hodder, R.M., in the matter of a summons heard before him at Petty Sessions holden at Ennis on the 12th and 26th May, 1893, the complaint being, "For that the defendant did, at Ennis, in said county, on the 22nd day of April, 1893, refuse to sell to said complainant, he being an inspector under the 'Sale of Food and Drugs Act,' an article of food, to wit, butter exposed to sale in the Ennis Butter Market in said county, the said complainant having applied to purchase the said article of food as aforesaid, and tendered the price for the quantity which he did require for the purpose of analysis, not being more than was reasonably requisite, contrary to the statute, etc."

At the hearing it was proved that the defendant Timothy M'Grath, farmer, had for sale in the Ennis Butter Market a firkin of butter containing about 70 lbs., that the complainant Sergeant M'Hugh, R.I.C., an inspector duly appointed under the said Act, applied to him to purchase one pound of butter, which, it was admitted, was an amount not more than was reasonably requisite for the purpose of analysis, and tendered the price for same, and that the defendant refused to sell the same to the complainant. It was admitted that, in the Ennis Butter Market, the farmers sold butter by the firkin, and did not break bulk for any purchaser, and that the butter so sold was purchased at wholesale prices by or on behalf of butter merchants, who subsequently disposed of the firkins either by exportation or by selling same to retail dealers. No

(1) Before Harrison, Johnson, and Gibson, JJ.

expert evidence was given as to what constituted a sale of butter by retail. It was contended by the complainant that on the day in question the defendant had butter for sale by retail; but Mr. Hodder, R.M., was of opinion that the defendant had not, on the day in question, butter for sale by retail; that the section of the Act of Parliament only applied to a sale of butter by retail, and not to a case where butter was on sale or exposed for sale by wholesale, and dismissed the summons. The opinion of the Court was thereupon required as to whether the said Justice was correct in point of law in his determination as aforesaid, and as to what should be done in the premises.

George Wright, *Q.C.*, *D. B. Sullivan*, *Q.C.*, and *D. F. Browne*, for the complainant (appellant) :—

This prosecution is under section 17 of 38 & 39 Vict. c. 63, The Food and Drugs Act, 1875, which provides that, if any officer under the Act, or inspector or constable, "shall apply to purchase any article of food or any drug exposed to sale, or on sale by retail on any premises, or in any shop or stores, and shall tender the price for the quantity which he shall require for the purpose of analysis, not being more than shall be reasonably requisite, and the person exposing the same for sale shall refuse to sell the same to such officer, inspector, or constable, such person shall be liable to a penalty not exceeding £10";—this provision being extended by the Amendment Act, 42 & 43 Vict. c. 30, s. 5, to articles so exposed in "any street or open place of public resort."

The case was decided by the Justice upon the ground that the section applied only to sales by retail, and at the hearing the contention was wholly whether the butter was on sale by retail. In several cases in county Clare, the Justices have convicted even in cases where the butter was exposed for sale in bulk. Rightly, as the clause "or on sale by retail on any premises or in any shop or stores," is independent of and does not govern the preceding words, "exposed to sale," which have a wider effect, and include the case of articles exposed for sale in bulk. Section 10 of the Margarine Act, 1887 (50 & 51 Vict. c. 29), shows that the right to obtain samples is not confined to articles exposed for sale by retail; and section 25 of the Food and Drugs Act, 1875, which

Q. B. Div. 1893.

M'HUGH v. M'GRATH.

provides that a defendant may be discharged if he prove that he bought the article in the same state as sold, and with a warranty, would be unintelligible unless there existed some means of restraining frauds by wholesale dealers. The policy of the Act being aimed at the prevention of frauds upon the public, it would be strange if retail dealers only were to be amenable, and if there were no means of stopping the evil at its fountain head. Both upon the literal construction of the section, and upon the aim and policy of the statute, we contend that there should have been a conviction in this case. [Counsel referred also to *Crane* v. *Lawrence* (1) and *Wheat* v. *Brown* (2).]

There was no appearance for the defendant (respondent).

HARRISON, J.:—

We are all of opinion that the decision of the magistrate was erroneous in point of law. Section 17 of the Act of 1875 applies to any article of food "exposed to sale," etc.; it does not say where such article may be exposed for sale. The Amendment Act, 1879 (42 & 43 Vict. c. 30), provides (section 5):—"Any street or open place of public resort shall be held to come within the meaning of section 17 of the principal Act." The learned Resident Magistrate held, as a matter of law, that the section only applied to a sale of butter by retail, and not to a case where butter was on sale, or exposed for sale, by wholesale. Upon this view he dismissed the case, as he held as a fact that on the day in question the defendant had not butter for sale by retail. Such was, no doubt, the fact; but, having regard to the mischief against which it was the object of the Act to guard, and to the wording of the 17th section, we are all of opinion that the first clause of the section does not apply merely to sale by retail. Section 17 says:—"If any such officer, inspector, or constable, as above described, shall apply to purchase any article of food or any drug exposed to sale"; then follows a distinct clause, "or on sale by retail on any premises or in any shop or stores"; and the section continues, "and shall tender the price for the quantity which he shall require for the purpose of analysis, not being more

(1) 25 Q. B. Div. 152. (2) [1892] 1 Q. B. 418.

than shall be reasonably requisite, and the person exposing the same for sale shall refuse to sell the same to such officer, inspector, or constable, such person shall be liable to a penalty not exceeding £10." The words of the first clause are met by the facts of this case, for the butter was exposed for sale. As there is no appearance for the respondent we can award no costs. The case will be remitted with our answer, that the Justice was not correct in his determination in the premises, and that he do proceed therein according to law.

JOHNSON and GIBSON, JJ., concurred.

Solicitor for appellant: *P. S. Connolly.*

A. E. R. J.

REG. (CATHERINE MURPHY) *v.* JUSTICES OF WEXFORD (1).

Petty Sessions Act, procedure—Order of Justices—Road contractor—Order authorizing road contractor to enter upon lands—Exceptions to be negatived—Time to be limited—Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 162.

An order of justices, made under 6 & 7 Wm. 4, c. 116, s. 162, authorizing a road contractor under the Grand Jury to enter upon lands for the purpose of taking gravel stones, &c., must show upon its face that the lands are not of the kinds excepted by the section, and should sufficiently limit the duration of the authority thereby given.

Fitzpatrick v. *Pyne* (13 Ir. C. L. R. 32) discussed. *Reg.* (*Bentham*) v. *Justices of Dublin* (14 L. R. Ir. 443) discussed and distinguished.

In applications under this section, where the procedure by summons under the Petty Sessions Act, 1851, is adopted, the order of the Justices is not the entry in the Petty Sessions Order Book, but the document which is issued to the contractor as his authority.

CERTIORARI.

Motion to make absolute, notwithstanding cause shown, a conditional order, dated 12th July, 1893, for a writ of *certiorari* to

(1) Before SIR P. O'BRIEN, C.J., and HOLMES and MADDEN, JJ.

Q. B. Div. 1893.

THE QUEEN v. JUSTICES OF WEXFORD.

remove and quash all and singular orders and adjudications of the above-named Justices, made at New Ross Petty Sessions District of the said county, on the 26th May and 9th June, 1893, on the hearing of an application in that behalf authorizing one Philip Kelly (in the orders described as Philip Kelly, road contractor, complainant) to enter certain lands in the occupation of the said Catherine Murphy, for the purpose of digging for, raising, and carrying away, in and out of said lands, any stones and other materials wanted for the keeping in repair the public high road, in the orders in the premises described, on the grounds that said orders were made without and in excess of jurisdiction; that the order of the 9th June was other and different from the order of the 26th May; that the order of 26th May was final and determined the jurisdiction of the Justices; that the orders of the 26th May and 9th June were bad in substance, and that neither order negatived the exceptions in that behalf contained in section 162 of 6 & 7 Wm. 4, c. 116; and that they did not define, specify, or limit the time or period during or within which either of them was to have operation.

The facts appeared to be as follows:—At the Summer Assizes, 1891, the Grand Jury of county Wexford entered into a contract with Philip Kelly for keeping in repair a portion of the public high road in that county. On the 25th April, 1893, Kelly obtained and had served upon Catherine Murphy a summons in the following terms:—

"PETTY SESSIONS (IRELAND) ACT, 1851 (14 & 15 VICT. c. 93).

FORM B.—SUMMONS.

PHILIP KELLY, Road Contractor, Palace, *Complainant*; CATHERINE MURPHY, Mylarspark, *Defendant*.

Petty Sessions District of New Ross, County of Wexford.

WHEREAS a complaint has been made to me that defendant did, at Mylarspark, county Wexford, on the 25th April, 1893, refuse to allow complainant, as road contractor, to enter upon your land at Mylarspark, where there is an open quarry, to obtain material for the repair of his contract road in the townland of Ballylane, which is the most convenient quarry, and that defendant show cause why an order should not be made by

the Justices at New Ross Petty Sessions to enter on your land to obtain said material: This is, &c.

(Signed), R. A. NAPPER,
Justice of said county. *25th April*, 1893.

To CATHERINE MURPHY, of Mylarspark."

This "complaint" came on for hearing at New Ross Petty Sessions, and after evidence had been given before Messrs. Brehon and Hearn, JJ.P., an order was made on the 26th May, 1893, which was thus entered in the Order Book of the Court:—

"Order granted to Philip Kelly, contractor, to enter on the lands of Catherine Murphy, at Mylarspark, to quarry and carry away material for the repair of his contract road at Ballylane, it being proved to our satisfaction that stones and material could not be conveniently procured elsewhere, and case adjourned to next Court-day to appoint arbitrators as to damage: 6 & 7 Wm. 4, c. 116, sect. 162."

On the 9th June, the case coming on (before General Napper and Messrs. Brehon and Hearn, JJ.P.), for the purpose of appointing the necessary arbitrators, the following order was entered on the Order Book:—

"Order granted, under the provisions of 6 & 7 Wm. 4, c. 116, sect. 162, case having been adjourned from last Court-day to appoint appraisers. P. W. Finn, county Carlow, appointed by the contractor. Catherine Murphy did not appear to appoint an appraiser, although notice has been served on her to appear on this day. Nicholas Cooney of Mylarspark, appointed by James C. Galavan, Esq., being a neighbouring magistrate. Order to continue in force during period of contract."

Prior to the hearing of the 26th May, the Clerk of Petty Sessions prepared, under the direction of the presiding Justice, an order or draft-order (exhibited in the affidavit of the Clerk as "B"), which, with certain alterations and corrections, was signed by Mr. Brehon, J.P., immediately after the hearing on the 9th June, Mr. Brehon initialling the alterations and interlineations. This document was dated the 9th June, 1893, and a one-shilling stamp was affixed thereto. From this the following order (called "C" in the affidavit of the clerk, and styled by him a fair copy) was

Q. B. Div. 1893.

THE QUEEN v. JUSTICES OF WEXFORD.

drawn up and subsequently signed by Mr. Brehon, J.P., out of Court, and stamped (1).

"PETTY SESSIONS DISTRICT OF NEW ROSS.

Form of Order for entering lands and carrying away stones and material, under the provisions of the 6 *&* 7 *Wm.* 4, *c.* 118, *s.* 162.

County of Wexford to wit.

WHEREAS the Grand Jury of the county of Wexford, at an Assizes held in the Summer of 1891 at Wexford, in the said county of Wexford, passed a presentment, under the provisions of the 6 & 7 Wm. 4, c. 116, for repairing and keeping of the public high-road, from Patrick Whitty's contract to Mr. Hughes' boundary at Ballylane, in the barony of Bantry and county of Wexford, for a period of five years, ending Summer Assizes, 1896; and whereas Philip Kelly has been declared by the said Grand Jury the contractor for the keeping in repair of said public high-road; and whereas it has been proved to my satisfaction, and to the satisfaction of R. C. Brehon and J. S. Hearn, Esquires, Justices of the Peace for said county, assembled at New Ross Petty Sessions on the 26th day of May, 1893, that the gravel, sand, stones, and other materials are required for repairing and keeping in repair of said public high-road, and that the same can be procured in a quarry situate on that part of the lands of Mylarspark, now in the occupation of Catherine Murphy, the defendant, and not conveniently elsewhere. Now I, the undersigned Justice of the Peace, in pursuance of the power and authority in that behalf given me by said section, do hereby authorize and empower the said Philip Kelly, as such contractor, so long as he shall continue as such, to enter into the lands of Mylarspark, now in the occupation of the defendant Catherine Murphy, for the purpose of digging for, raising and carrying away, in and out of said lands (2) any stones and other material wanted for the keeping in repair said public high-roads. And I further order that the said Philip Kelly shall make to the said Catherine Murphy such satisfaction for the damage done thereby, or by the taking of any such material, as shall be assessed by P. W. Finn, a householder, of Drumond, county Carlow, named by the said Philip Kelly as his appraiser. Catherine Murphy did not appear to name one on her behalf, although due notice had been served on her to appear this day for that purpose. Nicholas Cooney, of Mylarspark, has been named by James C. Galavan, Esquire, a neighbouring magistrate and Justice of the Peace [for] the said county. P. W. Finn and Nicholas Cooney being substantial householders who

(1) It did not appear whether this or any document was issued in fact to the contractor or not.—[REP.]

(2) In place of the word "*lands*," the document "B" had here the word "*quarry*." There were several other verbal differences between the documents "B" (as corrected) and "C."

shall be duly sworn to be the appraisers of such damage, and to view the same previous to and immediately after any damage being committed, and to give a true estimate thereof, in which estimate only the waste committed by breaking the surface of said land, or of making a passage through said lands, shall be included. Given under my hand at New Ross Petty Sessions this 9th June, one thousand eight hundred and ninety-three.

R. C. BREHON,
A Justice of the Peace for said county of Wexford."

[*Stamp* 1*s*.]

It would appear that, on the application of the appellant's solicitor for a copy of the order of the Justices, a certificate of the entries in the Minute Book was given, and that the documents "B" and "C" were first produced as exhibits in the affidavit of the Clerk of Petty Sessions.

M'Laughlin, *Q. C.* (with him *Jefferson*), for the applicant (1):—

Assuming that "C" is to be taken to be the order of the Justices, it is bad upon its face.

1. Such an order must show jurisdiction by negativing the exceptions mentioned in section 162 of 6 & 7 Wm. 4, c. 116: *Fitzpatrick* v. *Pyne* (2); *Reg.* (*Cust*) v. *Justices of Tipperary* (3); just as it must show jurisdiction by stating that materials could not be conveniently obtained elsewhere: *Butler* v. *Leahy* (4); and that the "complainant" was a Grand Jury contractor: *Reg.* (*May*) v. *Justices of Mayo* (5).

2. The order should limit the right of entry to a definite time: *Reg.* (*Bentham*) v. *Justices of Dublin* (6); *Reg.* (*Fitzgerald*) v. *Justices of Limerick* (7). This has not been done. The recital in the order is not sufficient, and a five years' limit would be unreasonable.

(1) Besides the contentions mentioned in the arguments of counsel here given, several other points not material to this report were raised on the affidavits and in argument; and questions were raised as to what was to be taken as the order made by the Justices—the entry or entries in the minute-book, the document "B," or the document "C."

(2) 13 Ir. C. L. R. 32.
(3) 17 Ir. C. L. R. 564.
(4) 1 Ir. L. T. 477.
(5) 16 L. R. Ir. 564.
(6) 14 L. R. Ir. 443.
(7) 27 Ir. L. T. R. 35.

Q. B. Div. 1893.

THE QUEEN v. JUSTICES OF WEXFORD.

Serjeant Dodd, and *William P. Ball*, for the respondent (Kelly) :—

Fitzpatrick v. *Pyne* (1) is not conclusive upon this Court, and is a doubtful authority, having regard to the way in which the point was there raised. The procedure under the Petty Sessions Act is adopted for convenience sake; but, upon the true construction of the section, the contractor, on application to the Justices, is entitled to his order if he satisfy them that he has been refused permission to enter, and that the materials cannot be conveniently obtained elsewhere. Having proved this, he is entitled to take the order, at his own peril. That order will protect him if he acts within the law, but will not protect him if he attempt thereunder to enter upon land of the kinds excepted. [HOLMES, J.: Then, if under such an order the contractor entered a quarry which was within a deer-park or orchard, and a civil bill was brought against him, and he justified under the order, the chairman ought to hold that the order was bad, while this Court could not quash it.] If the Justices are bound to inquire into this, it should be presumed that they did so, rather than that they did not. The Court will make every intendment in favour of an order of Justices: *R.* v. *Aire* (2); *R.* v. *Farringdon* (3); and, where no particular form is required, it is enough if the jurisdiction be sufficiently apparent upon the order: *Taylor* v. *Vaughan* (4). [MADDEN, J.: The principle in regard to summary convictions is that nothing should be intended for, and nothing against, such an order. HOLMES, J.: This order, as being against common right, must be construed strictly.]

The time is sufficiently limited by the order, the recital and the curial part being read together. *Bentham's Case* (5), which was followed, but unwillingly, by this Court in *Reg.* (*Fitz Gerald*) v. *Justices of Limerick* (6) is distinguishable. For here the authority is to enter during the continuance of the contract, and that period is fixed in the recital as five years. The provision in the English Act is different: see *Manvers* v. *Bartholomew* (7).

(1) 13 Ir. C. L. R. 32.
(2) 2 T. R. 665.
(3) *Ibid.* 466.
(4) 2 Q. B. Div. 907.
(5) 14 L. R. Ir. 443.
(6) 27 Ir. L. T. R. 35.
(7) 4 Q. B. D. 5.

M'Laughlin, Q. C., in reply.

Q. B. Div. 1893.

THE QUEEN v. JUSTICES OF WEXFORD.

[Reference was also made to the following cases:—*Reg.* v. *Justices of Flintshire* (1); *Reg.* v. *Treasurer of Kent* (2); *Reg.* (*Sullivan*) v. *Justices of County Cork* (3); *O'Leary* v. *Douglass* (4).]

Cur adv. vult.

Nov. 18.

SIR P. O'BRIEN, C.J.:—

We allowed this case to stand over, as it involved a point of some importance upon the construction of section 162 of the Grand Jury Act of 1836. It appears that a man named Kelly, a contractor under the Grand Jury of the county Wexford, took out a summons against a widow, named Catherine Murphy, with the object of obtaining from the Justices an order under this section permitting him to procure materials for the purposes of his contract on Mrs. Murphy's land. This summons was taken out and served, and Kelly adopted and utilized the Petty Sessions procedure. It was not sought, and in my judgment it would have been impossible, to adopt the Petty Sessions procedure in the sense that the entry made in the Order Book of the Justices could be considered to be the order of the Justices authorizing the contractor to enter upon the land, because the order contemplated by the Grand Jury Act is a special order, the original of which must be *dehors* the Petty Sessions Order Book. It is made under the authority of the particular section of the Grand Jury Act, to be embodied in a document signed by the Justice, which is to be given to the contractor as his warrant to enter, and his justification if he be sued for trespass. But the Petty Sessions procedure could be and was utilized in the sense that it was adopted as a convenient mode of bringing the parties into Court, of hearing the evidence, and of making a minute of what took place, until the final order, which was signed by Mr. Brehon, should be made up. A controversy has been raised as to what the order was, whether it was a certain document which was marked "B," or another which was marked "C." "B" is signed by the Justice, and so is "C." This fact is common to both documents; but which is the order? In our

(1) 3 D. & L. 537.
(2) 22 Q. B. Div. 603.
(3) 18 L. R. Ir. 99.
(4) 3 L. R. Ir. 323.

Q. B. Div. 1893.

THE QUEEN v. JUSTICES OF WEXFORD.

Sir P. O'Brien, C.J.

judgment the order is the latter document, namely, "C." *Ex facie*, "B" is a draft; it bears upon its face erasures and interlineations; and, though it is signed by the Justice, it is signed for the purpose of authenticating it as the draft from which the order might be made up. Besides, it is not exactly the same as the final order; it is different in phraseology in one important part. This document ("B"), which I hold to be the draft, says, "to enter into the said lands of Mylarspark, now in the occupation of the defendant Catherine Murphy, for the purposes of digging for, raising, and carrying away out of said quarry any stones and other materials wanted for the keeping in repair of said public high-road." There is no such word as *quarry* in the corresponding part of what I hold to be the final order, which in this corresponds with the all-important minute which was made on the 26th May. No doubt that minute was not the order; but it was a minute which should be regarded as containing the substance of what was to be the order. Looking then at the first document with its interlineations and erasures, bearing in mind, too, that it is referred to by Mr. Munro himself in one of the affidavits as a draft, and further that it does not correspond with the minute in the Order Book—it is clear that it is a mere draft, and that the other document "C" is the final and only order.

That being so, is this a good order? It has been questioned upon two grounds:—First, it is said that it does not limit the period of time within which entry might be made. The words are, "Now I, the undersigned . . . do hereby authorize and empower the said Philip Kelly as such contractor, so long as he shall continue as such, to enter, &c." Having regard to the fact that in the recitals of the order the contract is expressly described to be "for the period of five years ending Summer Assizes, 1896," and coupling this with the words which I have just read from the curial part of the order, I am of opinion that there is a sufficient limitation of time. A decision upon this question does not become material in the present instance; but, speaking for myself, I should hold that to be a sufficient limitation of time. The present case is distinguishable from *Reg.* (*Bentham*) v. *Justices of Dublin* (1); for in the latter there was no express mention of the time

(1) 14 L. R. Ir. 443.

for which the contract was to run. We followed *Bentham's Case* (1) some little while ago in *Reg.* (*Fitzgerald*) v. *Justices of Limerick* (2); and I own that, when the former case was cited to me, it took me by surprise; and, speaking for myself individually, I rather hoped that there might have been an appeal; for, in my judgment, it was an authority which, owing to the many cases in which such a limitation was omitted, might lead to great confusion. We are, however, bound by *Bentham's Case* (1). It is a decision of this Court, and we must follow it where it applies; but it does not apply here; and, speaking for myself, I think that a proper limitation of time is mentioned with sufficient clearness in this present case.

Then comes the question, Does it appear sufficiently upon this order that the Justices had jurisdiction to make it; and were they authorized by the 162nd section to make the order in this form? Ought it appear on the face of the order that the lands are not of the excepted class? This point was, in my opinion, left open by the decision in *Fitzpatrick* v. *Pyne* (3), where it was held that the order was bad because it did not appear on the face of it that the materials could not be conveniently obtained elsewhere. [The Lord Chief Justice then read the order (*i.e.* the document marked "C"), and continued]:—The word "land" occurs in the curial part of the order without any limitation whatever. Is that a good order within the meaning of the section? Mr. Ball's argument exercised me somewhat; it was ingenious, and afforded me for some little time the hope that I might not have to yield to Mr. M'Laughlin, whose client has no merits whatsoever. I am compelled, however, against my wish to yield to Mr. M'Laughlin's contention. Mr. Ball argued that the order satisfied the proviso at the end of section 162, and was therefore good. The words of the proviso are:—"Provided nevertheless that it shall not be lawful for any such contractor or surveyor to enter any lands for any such purpose against the will of the occupiers thereof, without the previous order of a Justice of the Peace, which order any such Justice is hereby authorized and required to grant, on its being proved to his satisfaction that the

(1) 14 L. R. Ir. 443. (2) 27 Ir. L. T. R. 35. (3) 13 Ir. C. L. R. 32.

Q. B. Div. 1893.

THE QUEEN v. JUSTICES OF WEXFORD.

Sir P. O'Brien, C.J.

gravel, stones, or other materials sought, cannot be conveniently procured elsewhere." Mr. Ball points out that the words there used are "any lands," not "any such lands," nor "lands save as aforesaid"; but "lands" generally; and that the word "elsewhere" does not assist his opponent's argument, for "elsewhere" must mean elsewhere than the lands in the previous part of the proviso, and that the word "lands" there means lands generally. He argues that the order would be good if it appeared that the Justice was satisfied that the materials could not be conveniently procured elsewhere, and that the contractor was a contractor under the Grand Jury for the making of a presented road; and, therefore, that this order as it stands would be sufficient, so far as the function of the Justice was concerned; but that the contractor should be careful; for, if he entered or took gravel or stones from a place which was in fact a deer-park or walled garden, or within any of the other exceptions of the section, he would do so at his own risk; that, in effect, all that was essential to the exercise of the magistrate's jurisdiction was that the applicant should be a Grand Jury contractor, and that the materials could not be conveniently procured elsewhere than on the lands where they were sought to be obtained, irrespective of the quality or character of these lands. Upon consideration, I am of opinion that this is not a sound argument. The same word in a proviso and in the body of a section *prima facie* bears the same meaning; and I do not think there is anything in the proviso to give the word "lands" used therein a wider, a more unrestricted, meaning than the word "lands" in the body of the section. The word "lands" both in proviso and body of section denotes lands the character of which is described and limited by the exclusion of lands of certain specified classes; and, so far as regards the quality and character of the lands upon which the contractor may enter, and in respect of which the Justice may make an order, I think that the authority of the contractor and the jurisdiction of the Justices are commensurate.

Now, it does not appear by this order that the lands mentioned in it are not of the excepted class—not that I think any very special or technical negativing of exceptions is essential; but, looking at the order as a whole, I do not think it appears, as I said, that the lands referred to are not of the excepted class; and as this

should appear, it being a condition of the jurisdiction of the magistrates that the lands should not be of the excepted class, the order is bad, and should be quashed. We are all of opinion that no costs should be allowed.

HOLMES, J. :—

I concur. I have no doubt that the order with which we have to deal in this case is the order of which a copy was given by the Petty Sessions clerk to the applicant before he applied for the writ of *certiorari*, and not the other document which was brought to the notice of the Court in the course of Serjeant Dodd's argument. I have no doubt that the last-mentioned document was merely a draft from which the final order was to be made ; and that, although it bore the signature of the Justice, such signature was appended for the purpose of identifying it as a corrected draft.

Having come to this conclusion, I agree with the Lord Chief Justice in the view that it does not comply with the provisions of the statute. I am of opinion that it is necessary that it should appear on the face of the order in some way—although not necessarily in any specific form of words—that the lands, upon which authority to enter is given, are not lands of a character coming within the exceptions mentioned in the section. In this particular case it does not appear either directly, inferentially, by recital, by the curial part of the order, or otherwise, that the lands were not lands excluded from the operation of the enactment.

As to the other point argued by Mr. M'Laughlin, I, like the Lord Chief Justice, have no doubt that, in the order before us, a limit of time is specified with sufficient clearness and distinctness. In the recital the date is given of the Grand Jury presentment by which the applicant for the order was constituted a contractor, and there is a statement that the contract was to continue for a specified number of years from that date ; and, in the curial part of the order the power thereby given is restricted to the period for which such contract shall continue. That, in my opinion, is amply sufficient to supply a limit of time within which the power conferred upon the contractor is to be exercised.

Q. B. Div. 1893.

THE QUEEN v. JUSTICES OF WEXFORD.

MADDEN, J.:—

I agree that we must treat as the order of the Justice the document finally signed by him as such, and not any antecedent minute or draft, although authenticated by his signature. This appears to me plain. On examining this order, I find that it authorizes the contractor to enter upon the lands of Mylarspark generally. There is nothing expressed on the face of the order limiting its operation to the class of land to which alone the 162nd section of the Grand Jury Act applies, that is to say, land which is not a "deer-park, bleach-green, or orchard, walled garden, haggard, or yard, or planted vale, lawn, or avenue to a mansion-house."

Serjeant Dodd contends that such a restriction, though not expressed, ought to be implied, inasmuch as the magistrate would otherwise have exceeded his jurisdiction. But the statement of this proposition carries its refutation with it. For not only is it a settled principle that nothing can be implied in aid of an order made in derogation of common right, under a section such as that now before us; but in regard to this particular section and the corresponding English enactment, it has been expressly laid down that they must be construed strictly, inasmuch as they authorize an interference with the ordinary rights of property: *Fitzpatrick* v. *Pyne* (1); *Earl Manvers* v. *Bartholomew* (2). By this I understand, not that the Court is to require a literal conformity with the wording of the statute, but that it must be satisfied that all the conditions necessary to found jurisdiction appear in substance on the face of the order. The decision of the House of Lords in *Eyre* v. *M'Dowell* (3) appears to establish the sufficiency of substantial compliance with the requirements of a statute to which this principle of construction is applicable; and if the description of the lands in the order made it reasonably clear that they did not fall within any of the excepted classes, the order would appear to me to be good, although the statutory exceptions were not in terms negatived. But the words of the order before us, unaided by implication, would authorize the taking of gravel out of (for example) an orchard situated on the lands in which a quarry might

(1) 13 Ir. C. L. R. 32. (2) 4 Q. B. Div. 5. (3) 9 H. L. Cas. 919.

happen to be. Mr. Ball, indeed, accepts this construction of the order, and contends that the proviso at the close of the 162nd section must be read as if it were an independent enactment, and not in connection with the earlier part of the section. This contention also is opposed to settled principles of construction. In the absence of express words, it is not to be assumed that a proviso at the end of a section refers to a different subject-matter from the enactment upon which it is engrafted. Mr. Ball relies on the absence of the word "such" before "lands" in the proviso. But unless he can go further, and show some reason why a different application should be given to the proviso, the mere absence of words of reference will avail him nothing. This he cannot do. On the contrary, his construction would lead to a result which I cannot impute to the Legislature in the absence of express and unambiguous words. It would follow that, on proof that the necessary materials could not be conveniently obtained elsewhere than in some orchard or garden, the magistrate would be bound to make an order authorizing the contractor to enter this orchard or garden, in direct contravention of the earlier part of the section. In the present case the order is bad, not merely because it fails to show upon its face the jurisdiction of the Justice, but because it may authorize the contractor to do an unlawful act, that is to say, to enter into any orchard or garden which may (for aught I know) be upon the lands, and there quarry and take away stones for the purpose of his work.

Being of opinion that the order is bad for the reasons already stated, I consider it unnecessary to discuss the objection founded on the absence of a limitation of time. I express no opinion as to whether the reference in the present case to a contract lasting so long as five years distinguishes the present case in substance from *Bentham's Case* (1), or whether a reference to such a contract amounts to a reasonable limitation as regards time.

Solicitor for prosecutrix: *John R. Colfer.*
Solicitor for respondent: *Evans Boyd.*

A. E. R. J.

(1) 14 L. R. Ir. 443.

Q. B. Div.
1893.
Dec. 4.

HILTON *v.* HELLIWELL (1).

(1893. No. 2627.)

Agency contract—Construction—Commission—Orders incomplete at termination of agency.

A contract for agency provided that the agent was to be paid a commission for work done or supplied in Ireland from the date of the contract at 6¼ per cent. on amount of orders; that the contract should be terminable on notice—neither party to be entitled to compensation, but the agent to receive (on the termination of the contract) such commission as should have been earned, and should be or become payable:—

Held, that on the terms of the agency contract the plaintiff (the agent) was not entitled to be paid commission in respect of work, the order for which was obtained by his negotiation, but which was not done until after the agency had been determined.

Motion on behalf of defendants, to reduce verdict and judgment had for the plaintiff on the trial by the amount of a commission on a contract to supply patent glazing for a new station in Cork.

The facts of the case are fully stated in the judgments.

Drury (with him *R. P. Carton, Q.C.*, and *John Roche, Q.C.*), for the defendant, in support of the motion.

James Campbell, Q. C., and *T. L. O'Shaughnessy, Q.C.* (with them *Molyneux Barton*), for the plaintiff, cited *Harris* v. *Petherick* (2), *Bayley* v. *Chadwick* (3), *Fisher* v. *Drewe* (4).

Roche, Q.C., in reply, cited *Noah* v. *Owen* (5).

Cur. adv. vult.

(1) Before Sir P. O'Brien, C.J., and Gibson and Madden, JJ.
(2) 39 L. T. (N. S.) 543.
(3) 37 L. T. (N. S.) 593.
(4) 39 L. T. (N. S.) 253.
(5) 2 T. R. 364.

SIR PETER O'BRIEN, C.J. :—

The point presented for our consideration is one of some nicety. The plaintiff entered into a contract with Mr. Helliwell, whereby he agreed to become sole representative in Ireland of Mr. Helliwell, who was the owner of certain valuable patents for glazing and zinc roofing. The agreement, which was in writing, was dated the 10th June, 1890. The clauses material to the point in issue are as follows:—By clause 2 the plaintiff was to travel and canvass for orders in Ireland, and undertook to do this work zealously and continuously. Other clauses bound him to keep an office, pay his own travelling expenses, canvassing and securing orders. Clause 8, upon which the question before us principally turns, was as follows:—"The patentee to pay the said H. Hilton a commission of 6¼ per cent. on all patented glazing and zinc roofing done or supplied by the patentee in Ireland, such commission to be paid on the net amounts of the order or orders." Clause 9: "The patentee is to advance the said H. Hilton £4 every week on account of his commission." Clause 10: "The balance of same commission is to be paid by the said patentee to the said H. Hilton within fourteen days after the receipt by him of the money paid for the work done, or instalments of same as the work proceeds, if the payments be so made." Clause 12: "This agreement is to cover all orders received and work done from the date hereof." Clause 14: "This agreement shall be terminable by either party at the expiration of six months by written notice, to be served in the usual way at the office or registered address of the parties; but in such event neither party shall be entitled to recover any compensation save the commission, which shall, under the terms of the agreement, have been earned, and shall have or may become payable."

Such is the contract, so far as is material to the question before us.

In December, 1890, the plaintiff entered into communication with the Great Southern and Western Railway Company, who were about to build a new station at Cork. The jury found, and I think there was evidence to support the finding, that the plaintiff's action ultimately led to the tender and contract which followed in June and July, 1891. But, in my opinion, what took

Q. B. Div. 1893.

HILTON v. HELLIWELL.

Sir P. O'Brien, C.J.

place in December, 1890, rested only in preliminaries, though no doubt in preliminaries which were far advanced.

In January, 1891, the plaintiff wrote a peremptory letter, resigning the agency, and, on the acceptance by the defendant of the resignation, on the 19th January, 1891, the agency was determined.

In June, 1891, the patentee sent in a tender for the glazing of the roof of the new station at Cork, and in July, 1891, this tender was accepted and a formal contract entered into. Until then, in my opinion, an order was not, within the meaning of the 8th clause of the contract, obtained.

Now the question is, whether the plaintiff is entitled to commission of $6\frac{1}{4}$ per cent. on the amount of this contract. In my judgment, on the true reading of the agency agreement, the *right* to commission arose on the work being *done* or *supplied*, while the *measure* of the commission was $6\frac{1}{4}$ per cent. on the net amount of the order or orders. This is the grammatical construction of the 8th clause.

It may, indeed, be contended, with some plausibility, that the right to commission arose when the order was given, no matter when the work was done. This view of the agreement would not, however, help the plaintiff, as the order was not given until some months after the agency determined.

Now, the words in the 14th clause—"shall have been earned, and shall have or may become payable"—have been much pressed by counsel for the plaintiff. But collating these words with the 10th clause, I have formed the opinion that though payment of the commission to the plaintiff is deferred till the payment of the contract price to the defendant, it is only when an order is given and work done during the existence of the agency contract that the commission is "earned"; and as in this case neither the order was given nor the work done during the agency, no commission can be considered as having been "earned" by the plaintiff in respect of the Cork contract.

Now, it is urged that this was a hard bargain, an unreasonable contract. Well, in the first place, we are not to decide according to our views as to the unreasonableness of the contract. Our function is to ascertain what is the true construction of the agree-

ment entered into by the parties, and give effect to that construction. But in the second place, I do not think the agreement unreasonable. It must be remembered that by this agreement, as was conceded in argument, Mr. Hilton would become entitled, during the continuance of the agency, to a commission on work done or supplied, even in cases where he had no privity with the orders—where he had in no way contributed to obtaining the orders; and the parties to the agreement may not unnaturally have thought it not unreasonable to provide that, on the other hand, he should not get any payment for matters resting in negotiations, or for matters preliminary or antecedent to a contract or order (for I think a "contract" or "order" are convertible terms); but that the only thing he should be entitled to should be a "commission" on work done or supplied by the patentee during the agency, or at least on orders in the sense of completed contracts obtained during the agency.

I differ from my brother Johnson as to the construction of the contract; but in order to avoid the necessity of a new trial I would, if I had tried the case myself, have taken the opinion of the jury, as he did, on the questions submitted to them. As a general rule all questions, the answers to which may obviate the necessity of a new trial, should be submitted to the jury.

We reduce the verdict by the amount of the commission on the Cork contract, and enter judgment accordingly.

GIBSON, J.:—

The patentee's obligation to pay commission on all glazing done in Ireland was absolute, and did not depend on such glazing having been done under orders secured through the plaintiff's instrumentality. The right of the plaintiff, however, to commission on work done must be subject to some limitation; and the question is, what that limitation is to be. According to the defendant, the right to commission under clause 8 of the contract arises only if and so far as work may be actually done during the continuance of the plaintiff's employment as agent, the amount of commission being regulated by the net amounts of the orders. Even if the actual doing of the work during the agency is not regarded as a condition precedent to commission,

Q. B. Div. 1893. HILTON v. HELLIWELL. Gibson, J.

defendant's counsel further contended that at least the orders under which the work is done must be given during the actual employment. On the other hand, according to the plaintiff, it is immaterial that the order is given, and the work done after the determination of the agency, the only condition limiting the commission being that the order must be the result of negotiations initiated on the part of the plaintiff, or any other person, while the agency contract was undetermined. It was argued that the contract here fell within the general principle illustrated by such cases as *Green* v. *Bartlett* (1), and *Green* v. *Lucas* (2), that commission is earned by the introduction, and that the employer cannot defeat the agent's right to payment by determining the employment before the transaction is completed: Lord Watson's judgment in *Toulmin* v. *Millar* (3). The agency was determined in January by plaintiff's own act, and no question of wrongful determination of the agency arises, such as was considered in some cases.

Having regard to the nature, language, and context of the contract between the parties, I was strongly impressed at an early period of the argument by the view presented on behalf of the defendant, which seemed to fit the phraseology, and to supply a convenient limitation to the defendant's obligation under the 8th clause. The plaintiff's argument pressed to its logical results would certainly involve strange consequences. If Helliwill had negotiated directly with the Company's engineers for the Cork work, though no order was given and no work done till long after the plaintiff had ceased to be agent, the plaintiff, without having taken any part in or having even any knowledge of the negotiation, would be entitled to commission, if the negotiation commenced during his agency led to the subsequent order. Met by this difficulty, Mr. O'Shaughnessy, Q.C., suggested an alternative and inconsistent construction of the contract according to which the plaintiff's right to commission is limited to orders resulting from his own intervention. This, however, is not the agreement. The plaintiff during his agency was clearly entitled to commission on all orders placed and executed in Ireland. I have some doubt if the exact state of facts that we have to deal

(1) 14 C. B. (N. S.) 681. (2) 33 L. T. (N. S.) 584. (3) 58 L. T. (N. S.) 96.

with here was contemplated by the parties. The acute and searching argument of plaintiff's counsel has raised doubts in my mind not yet entirely removed. If the contract is ambiguous, and is capable of the construction they suggest, it ought (they contend) to be interpreted with regard to the settled principle applicable to agency contracts, that the commission is earned by the negotiation, at least where the negotiation results in an order duly executed. Whatever doubt, however, I may entertain, my respect for the opinion of my Lord, and my brother Madden, convinces me that it must be unfounded, and I do not dissent from their judgment.

For the purpose of our decision, I assume in the plaintiff's favour that the third finding of the jury was free from objection in form and was justified by the evidence. In a case like the present, clear and distinct proof ought to be required to establish that the order resulted directly from negotiation during the agency contract sued on, and not from anything before that specific agency commenced, or after it terminated. I have not thought it necessary to consider the point, as though it was glanced at, it was not pressed by defendant's counsel, who directed their argument to the construction of the contract, on which the Court now decides in their favour.

MADDEN, J.:—

The question for decision turns entirely on the construction of the agency agreement, and in the view which I take of this document the cases cited for the plaintiff have no bearing on the point in issue.

The contract states succinctly, though with sufficient clearness, the duties which the plaintiff undertook as representative of Mr. Helliwell, and the way in which he was to be remunerated for the discharge of those duties. He was to act as general representative of the patentee, to travel and canvass for orders, and to keep an office for the purpose of the business. All this he was to do at his own expense, and, in return, he was to become entitled to a commission, under certain conditions, and the question for our decision is, what were those conditions. In my opinion the doing or supplying of work in Ireland by the patentee during the continuance

Q. B. Div. 1893.

HILTON v. HELLIWELL.

Madden, J.

of the agency was the condition on which the plaintiff became entitled to remuneration, no matter how the order for the work was obtained, whether by the exertions of the plaintiff or otherwise.

The eighth and following clauses of the agreement provide for three things: First, the circumstances under which the commission is to be considered as earned; secondly, the amount upon which it is to be calculated; and, thirdly, the time and manner of payment. It is only in regard to the second of those matters that the word "order" is used in the agreement; and it is used as defining the *measure* of the remuneration, which is to be a commission of 6¼ per cent. on the net amount of the order. With regard to the third matter, the commission is made actually payable only on payment to the patentee of the price of the work. The condition of earning the commission appears to me to be defined by the eighth clause, and to consist in the doing of the work; but even if it were the giving of the order it would not assist the plaintiff, inasmuch as both tender and contract were after the termination of the contract.

Mr. Campbell and Mr. O'Shaughnessy have ingeniously contended that this contract has the same effect as if it had contained a provision that the plaintiff should receive his commission, whether the orders for the work done were obtained through his exertions, or those of others, and they have called in aid certain cases in which commission has been held earned by the exertions of the agent, independently of the actual order. There might be some difficulty if those words were in the contract, for in that case it might have been contended that the negotiation of orders by the plaintiff, or by others, was the condition on which commission became payable. But in this agreement no such provisions exist, and cases of the class to which I have referred have therefore no application.

Solicitor for the plaintiff: *R. O. Norwood.*
Solicitors for the defendant: *William Read & Son.*

G. G.

TIGHE, LANDLORD; CLEMENTS, TENANT (1).

Appeal. 1893.

Jan. 17, 30.

Land Law (Ireland) Act, 1887, *sect.* 1—*Surrender of lease—Expiration of lease—Compensation for improvements—Fair rent fixed on buildings—Right of pre-emption.*

An unexpired lease contained a stringent covenant against alienation, and a proviso, giving to the lessor, in the event of the covenant being broken, and in certain other events, a right of pre-emption at a sliding scale of prices, so adjusted that if the event conferring the right of pre-emption happened at a date conterminous with the expiration of the term, the lessor should not be liable to any claim under the Land Act of 1870, or otherwise. The lease also contained a clause enabling the lessee "to determine the lease by surrendering the same" and "delivering up the premises and all buildings thereon," in which event the lessor was bound to pay to the lessee a sum to be calculated according to a sliding scale so arranged that if the surrender was conterminous with the expiration of the lease, the landlord was not to be liable to any claim under the Land Act of 1870, or otherwise. The lessee served an originating notice to have a fair rent fixed under the Land Law (Ireland) Act, 1887:—

Held, that, in fixing the fair rent of the holding, buildings erected by the tenant or his predecessors in title on the demised premises were not to be treated as exempt from rent.

CASE STATED by the Irish Land Commission for the consideration and decision of Her Majesty's Court of Appeal.

"By an indenture of lease dated the 13th of April, 1880, the lands constituting the holding in the present case were demised by Colonel James Stuart Tighe to John Clements for the term of thirty-five years, at the yearly rent of £286, which was reduced, in the year 1882, to the sum of £266.

"On the 25th March, 1889, an originating notice of an application to fix a fair rent was served by the lessee, and on the 10th July, 1891, an order was made by a sub-commission fixing the fair rent of the holding at £210. On the 9th September, 1891, a notice of rehearing was served on behalf of the landlord, and on

(1) Before WALKER, C., SIR PETER O'BRIEN, C.J., and FITZ GIBBON and BARRY, L.JJ.

Appeal. 1893.

TIGHE, *Landlord*; CLEMENTS, *Tenant.*

the 29th March, 1892, the case came on before us for re-hearing.

"It was proved by the tenant, and admitted by the landlord, that the dwellinghouse and part of the other buildings upon the demised premises had been erected by the tenant or his predecessors in title; but on behalf of the landlord it was contended that, having regard to the special provisions contained in the lease of the 13th April, 1880, the tenant was not entitled to be exempted from rent in respect of these buildings.

"The lease contained a covenant by the lessee against alienation without the consent in writing of the lessor, and a proviso in the following terms:—'If and whenever the lessee, his executors, administrators, or assigns, or any of them, shall during the said term alien, sub-let, or otherwise dispose of, or let in conacre, the said lands and premises, or any part thereof, or in any manner part with the possession of the same, or any part thereof, without such consent in writing as aforesaid, or be adjudged bankrupt, or become an insolvent debtor or debtors within the meaning of any Act of Parliament, or if and whenever the said premises, or any part thereof, shall be taken in execution, or any proceedings shall be taken to sell the same, or any part thereof, by any creditor of the lessee, his executors, administrators, or assigns, or if the said lessee shall die without leaving issue, or wife him surviving, or if there shall be a failure of succession to the brother of the lessee or to the child or children of such brother, it shall be lawful in any of the said cases for the lessor, his heirs or assigns, and he or they shall have the power to purchase, by way of pre-emption, the interest of the said lessee in the said demised premises, the consideration money to be paid for such purchase to be as follows, viz. if such right to purchase shall accrue before the 25th March, 1904, the sum of £1100 to be in full discharge and satisfaction of all claims and demands whatsoever of the said lessee, his executors, administrators, or assigns, whether under the Landlord and Tenant (Ireland) Act, 1870, or otherwise howsoever; if before the 25th March, 1905, £990, and so on in like manner, the purchase-money to be reduced year by year by the sum of £110, so that at the expiration of the term of thirty-five years from the term hereby created the said lessor, his heirs, or assigns, shall not be liable to

any claim or demand whatsoever of the said lessee, his executors, administrators, or assigns, in respect of compensation or otherwise howsoever.' This clause was followed by an agreement—'that it shall be lawful for the said lessee, his executors, administrators, or assigns absolutely to determine the lease hereby granted by surrendering the same on giving to the lessor, his heirs, and assigns, six calendar months' notice in writing of his or their intention so to do, and on the lessee, his executors, administrators, or assigns, paying all rent due up to the date of such surrender, and delivering up the premises and all buildings thereon in good substantial and habitable order, repair, and condition then that immediately upon such determination of the said lease by the said lessee, his executors, administrators, or assigns, as aforesaid, the said lessor, his heirs, or assigns, will pay to the said lessee, his executors, administrators, or assigns the consideration money following, viz. if such determination of said lease shall be made as aforesaid before the 25th March, 1904, the sum of £1100 to be in full discharge and satisfaction of all claims and demands whatsoever of the said lessee, his executors, administrators, or assigns, whether under the Landlord and Tenant (Ireland) Act, 1870, or otherwise howsoever; if before the 25th March, 1905, the sum of £990, and so on in like manner, the consideration money to be paid for the determination of the said lease to be reduced year by year by the sum of £110, so that at the expiration of thirty-five years from the term hereby created the said lessor, his heirs, or assigns, shall not be liable to any claim or demand whatsoever of the said lessee his executors, administrators, or assigns, whether under the said Act or otherwise howsoever.' We refer to the said lease.

"We held that, if the term of the lease had expired by effluxion of time, the lessee, having regard to the provisions above stated, would not be entitled to claim compensation under the Landlord and Tenant (Ireland) Act, 1870, for the said buildings erected by him or his predecessors in title, and that the lessee in the present case, having elected to avail himself of the benefits conferred by the Land Law (Ireland) Act, 1887, was entitled, under the first section of that Act, to be deemed a tenant of a present tenancy, in like manner, and subject to like conditions, as if the lease had expired, and consequently could not claim to be exempted from

Appeal. 1893.

TIGHE, *Landlord*; CLEMENTS, *Tenant.*

rent in respect of the buildings referred to. We fixed the fair rent of the holding at £225, and in ascertaining that rent we treated the buildings as not exempt from rent. The question for the consideration of the Court is:—Whether in fixing a fair rent of the holding the lessee is entitled to be exempted from rent in respect of the buildings erected by him or his predecessors in title?" It appeared from the lease that the erection of the buildings formed part of the consideration for which it was granted.

D. Kehoe, for the tenant.

F. A. P. Hamilton, for the landlord.

[The following cases were cited: *Hodges* v. *Clark* (1); *Adams* v. *Dunseath* (2); *Moylan* v. *Finch* (3); *Barton* v. *Atkinson* (4); *Looby* v. *Finch* (5); *Perrott* v. *Dennis* (6).

Cur. adv. vult.

Jan. 30.

WALKER, C.:—

The question submitted to us by this case is, whether the lessee, in fixing the fair rent of his holding, is entitled to be exempted in respect of the buildings erected by him or his predecessors in title.

The argument before us proceeded upon two admissions as to legal results, which we assume to be correct for the purposes of our decision: 1, that the tenant would be exempted from rent only in a case where he would be entitled to compensation for improvements in respect of these buildings; and 2, that if the lease in the present case had expired by effluxion of time, its provisions in such an event are sufficient to exclude the present claim.

The lease bears date the 13th April, 1880. It is for a term of thirty-five years, and at a rent (as reduced) of £266, and, under the circumstances, it was competent for the lessee to exclude himself by contract in it from compensation for improvements. The lease contains a strict covenant against alienation, and also a curious clause giving a right of purchase to the lessor, on the

(1) 17 Ir. L. T. R. 83.
(2) 10 L. R. Ir. 109.
(3) 28 L. R. Ir. 595.
(4) 30 L. R. Ir. 396.
(5) *Ibid.* 568.
(6) 18 L. R. Ir. 29.

happening of any one of the therein named events, at a sliding scale of prices, so adjusted that if the event giving the right of pre-emption, happened at a date conterminous with the end of the term of thirty-five years, the lessor should not be liable to any claim in respect of compensation, or otherwise howsoever.

The lease also contains a clause enabling the lessee "*absolutely to determine the lease by surrendering the same*," on giving six calendar months' notice in writing, and on the lessee "delivering up the premises *and all buildings thereon*" in good condition, and in that event the lessor was bound to pay a sum of money fixed, "if such determination of said lease shall be made before the 25th March, 1904," at the sum of £1100, and diminishing thence-forward by a sliding scale to the end of the term, so that if the surrender was conterminous with the expiration of the term, the lessor should not be liable to any claim under the Land Act of 1870, or otherwise howsoever. The words of the clause, "absolutely to determine the lease by surrendering the same," and by "delivering up the premises and all buildings thereon," are in strange contrast to the argument of the tenant before us.

This is a lease within the 21st section of the Act of 1881, and therefore if the Act of 1887 had not passed, the lessee in 1915, on the expiration of his lease, would be deemed to be a tenant of a present ordinary tenancy from year to year, at the rent and subject to the conditions of his lease, so far as such conditions would be applicable to a yearly tenancy; but it is, I think, clear that in such a case he could not be held exempted from rent in respect of these buildings, for they would have already become the property of the landlord when the year 1915 was reached.

But the Act of 1887 was passed, which enables a lessee, if he choose, to make a particular form of application to the Land Commission, by virtue of which he is, *ipso facto*, against the will of the landlord, "deemed to be a tenant of a present tenancy in like manner and subject to like conditions as if his lease had expired," and his holding thereupon is to be subject to all the provisions of the Act of 1881, with regard to present tenancies, as if the tenancy were a yearly one. Mr. Clements exercised that option on the 25th March, 1889, and, *prima facie*, it would seem he could not be better applying under the Act of 1887 than if he

Appeal. 1893.

TIGHE, *Landlord*; CLEMENTS, *Tenant.*

Walker, C.

waited till he could apply under the Act of 1881. But Mr. Kehoe argued that the tenant was in a better position when he applied under the Act of 1887, and his ingenious contention comes to this—he does not dispute that the words "expiration" and "expire," in section 21 of the Act of 1881, and the word "expired" in section 1 of the Act of 1887 must receive the same construction, but he says that "expire" in section 21 of the Act of 1881 includes "surrender," for which proposition he cites *Hodges* v. *Clark* (1), comprising a surrender under the terms of the present lease, and that the service of the notice under the Act of 1887 is equivalent or analogous to a surrender under which the lessee would be entitled to claim £1100 compensation.

That argument involves, of course—1, the correctness of the decision in *Hodges* v. *Clark* (1); and 2, its application to the present case. Both of these consequences have been challenged before us. It is, I think, wholly unnecessary for me to express an opinion upon *Hodges* v. *Clark* (1), and I hold myself quite free to consider that decision in any case where the point involved in it arises. But here there was never any surrender in fact, nor any surrender by an act referable to the contract of both lessor and lessee. The accelerated determination of the lease was, by an act of the lessee against the will of the lessor. The vice of the argument is, that it treats the tenancy, at the same moment, as determined and as undetermined; and the obvious injustice of the contention is that the tenant perpetuates the tenancy, while he claims money from the landlord for yielding up the lands to him. It is to my mind clear that where the tenant, for his own purposes, accelerates under the Act of 1887 the natural expiration of the lease (as he has a right to do), he must be deemed to assume the consequences of the natural expiration of the lease, along with the imputed expiration, and that having chosen, against the will of the lessor, to put himself in the same position as if he were applying in 1915, he must bear the burden as well as the benefit resulting from his own option.

The result is, that we must answer the question put to us by saying that the lessee in the present case is not entitled to be exempted from rent in respect of the buildings in question.

(1) 17 Ir. L. T. R. 83.

SIR PETER O'BRIEN, C.J.:—

I concur in the judgment of the Lord Chancellor. *Hodges* v. *Clark* (1) came upon me by surprise. It is, however, plainly distinguishable from the present case, because there the term was put an end to, pursuant to the terms of the contract, and it was held that there was an expiration of the lease within the meaning of the Act of Parliament. At the same time, while I think that this case is distinguishable from *Hodges* v. *Clark* (1), I wish to guard myself from its being supposed that I desire now to express approval of it. I express neither approval nor disapproval of the decision in that case. Here the term was put an end to irrespective of contract. Its expiration was anticipated by the notice to fix a fair rent.

FITZ GIBBON, L.J.:—

I have already in *Perrott* v. *Dennis* (2) guarded myself against any express sanction of the decision in *Hodges* v. *Clark* (1), and the principle involved in that decision must be considered if it ever comes before this Court. But we need not discuss that question now, as we decide this case quite irrespectively of the decision in *Hodges* v. *Clark* (1). We are asked whether, in fixing a fair rent of this holding, the lessee is entitled to be exempted from rent in respect of the buildings erected by him or his predecessors in title. The only buildings which were so erected appear from the lease to have been erected as part of the consideration for the lease itself, and under its provisions they were to become the property of the landlord on its expiration. The lease provides a graduated scale of compensation for the buildings to be paid to the tenant in the event of the determination of the lease, by surrender, or by notice to quit, before its expiration by efflux of time. The lessee has voluntarily come into Court seeking to fix a fair rent under the Act of 1887. The first section of that Act gives him the right to be "deemed to be a tenant of a present tenancy . . . as if his lease had expired," that is, we are to anticipate or wipe out the intervening years, and treat the rights of the tenant as being now the same as they would be hereafter, if he had waited until the lease had

(1) 17 Ir. L. T. R. 83. (2) 18 L. R. Ir. 29.

Appeal. 1893.

TIGHE, *Landlord*; CLEMENTS, *Tenant.*

Fitz Gibbon L.J.

determined by efflux of time. The moment the case is thus regarded, we find that the lease provides that, when it so expires, the tenant shall have no right to compensation for the buildings. I am therefore of opinion that in fixing the fair rent of the holding the buildings which have been erected by the tenant ought not to be exempted from rent. He cannot alter his rights in his own favour by taking advantage of a statute which only enables him to elect to antedate and anticipate them.

BARRY, L.J. :—

I concur. However, I am not to be taken as expressing any approval or disapproval of *Hodges* v. *Clark* (1).

Solicitor for the tenant: *J. A. Mulhall.*
Solicitor for the landlord: *T. T. Mecredy.*

G. Y. D.

WEST, LANDLORD; HUGGARD, TENANT (2).

Appeal. 1893.

June 30. July 3, 13.

Landlord and tenant—Sub-tenant from year to year in occupation—Notice to quit—Determination of middle interest—Land Law (Ireland) Act, 1881, section 15.

D., who held an agricultural holding under W. as tenant from year to year, sublet the holding to H. as a yearly tenant. While H. was in occupation and a present tenant within the meaning of the Land Law (Ireland) Act, 1881, W. served a notice to quit and determined D.'s tenancy :—

Held, that H. thereupon became tenant from year to year to W., and entitled to fix the fair rent of the holding.

CASE STATED by the Irish Land Commission for the consideration and decision of Her Majesty's Court of Appeal.

The facts of the case and the arguments appear sufficiently from the judgment of the Lord Chancellor.

Sandford, for the landlord.

(1) 17 Ir. L. T. R. 83.

(2) Before WALKER, C., and FITZ GIBBON and BARRY, L.JJ.

Wade, for the tenant.

Appeal. 1893. WEST, *Landlord*; HUGGARD, *Tenant.*

[The following cases were cited by counsel:—*Allen* v. *Derby* (1); *Seymour* v. *Quirke* (2); *Frewen* v. *Smith-Barry* (3); *Roe* v. *Cooney* (4); *Lewin* v. *Eagleton* (5); *Massy* v. *Norse* (6); *M'Carthy* v. *Swanton* (7); *Inchiquin* v. *Lyons* (8); *Ormsby* v. *Crean* (9); *Dillon* v. *Dillon* (10); *Commins* v. *Barron* (11).]

WALKER, C.:—

July 13.

This case raises a most important question on the construction of the 15th section of the Land Act of 1881. Sir Raymond West holds the lands of Knockroe, in the county of Kerry, under a lease for 3 lives in being.

In 1876, Patrick Donovan became tenant from year to year of 6A. 2R. 10P. of those lands under the predecessor in title of Sir Raymond West, at the rent of £20, and about the same year Donovan sublet the lands to Richard Huggard, at the rent of £22 10*s*. Previous to the 25th March, 1889, Sir Raymond West caused to be served on Donovan a notice to quit on the 29th September, 1889, and this notice was also served on Richard Huggard.

Huggard refused to give up possession, and a civil bill ejectment was brought by the head-landlord, which was served on Donovan and Huggard. This case was on January, 1890, adjourned to the sessions held in April, 1890, when a decree for possession was granted. Richard Huggard appealed.

Richard Huggard had also on the 14th March, 1890, served an originating notice to fix a fair rent on Sir Raymond West, which was dismissed by the County Court Judge. Huggard appealed to the Land Commission. The appeal from the decree in ejectment came before Mr. Justice Gibson in July, 1890, who dismissed the ejectment on the ground that Huggard was entitled to possession under sect. 15 of the Act of 1881. The appeal in the

(1) 16 L. R. Ir. 346, 351.
(2) 14 L. R. Ir. 97; 455 (App.).
(3) 27 Ir. L. T. 292.
(4) 14 L. R. Ir. 243.
(5) Mac D. 383.
(6) 20 L. R. Ir. 57; 464 (App.).
(7) 14 L. R. Ir. 365.
(8) 20 L. R. Ir. 474.
(9) *Ibid.* 526.
(10) 17 Ir. L. T. 466.
(11) 19 Ir. L. T. R. 38.

Appeal 1893.

WEST, *Landlord*; HUGGARD, *Tenant*.

Walker, C.

fair rent case came before the Land Commission at Killarney, in February, 1893.

The proceedings were then continued in the name of Julia Huggard, the legal personal representative of Richard Huggard, who had died. The case states that the Court was of opinion that the appellant was entitled to have a fair rent fixed, but on the application of the landlord they agreed to state a case for this Court on the question whether Julia Huggard is entitled to have a fair rent fixed under the provisions of the 15th sect. of the Act of 1881.

The case, therefore, raises the net question on the 15th section in the following form:—Suppose A, owner and head-landlord of the lands of Blackacre; B, tenant from year to year to A of same lands; and C, sub-tenant from year to year under a sub-tenancy created by B, C being in occupation, and a present tenant within the meaning of the Act of 1881; if A serves notice to quit on B, and determines his tenancy, does C, on such determination, become tenant from year to year to A and entitled to fix a fair rent against him. The difficulty arises on the words "during the continuance of any tenancy from year to year" in the first branch of the section, and the words "during the continuance of such tenancy" in the second branch. It is said there cannot be a continuing yearly tenancy in C, because it springs out of and depended on the existence of the tenancy of B, which in the case put has come to an end.

But it must be remembered that we have to construe a section of an Act which was intended to give the occupying present tenant a new status and new rights, and C therefore can *prima facie* fix a fair rent against B, and so could B against C, if he (B) were occupying tenant; and it seems to me that there is great reason for supposing that the intention of the section is to transfer the rights of B, who is not occupier, to C, who is, and that the section is satisfied when you have the lands, on the determination of the mesne interest, in the hands of an occupying yearly tenant, and that the words are equivalent to "while there is a subsisting yearly tenancy."

Let us see how far decision has carried the question. If, in the case I have put, B held the lands from A for the life of

John Brown, and had demised to C for the life of the same John Brown, and John Brown died, it is settled by *Seymour* v. *Quirke* (1) 1, that C, whose lease had determined, would have imputed to him a yearly tenancy; and, 2, that such yearly tenancy would become attached to the reversion existing in A. In other words, that there would be a "continuance" of a tenancy from year to year in C, and that A would become his landlord "during the continuance" of such tenancy, which really only commenced to exist at the point of time when the leases of B and C ended. If the imputed yearly tenant is within the 15th section, on what principle is the actual yearly tenant to be excluded?

Mr. Sandford was driven to contend that the 15th section only applied to a case like *Seymour* v. *Quirke* (1), which, in fact, seems to me a case stronger than the present; or, 2, which is by far the most logical contention, that it only applies to a case where the yearly tenancy already bound the reversion of the head landlord. But if that be the true construction, I cannot see what object the section would accomplish, and it is certainly inconsistent with the result of the decision in *Seymour* v. *Quirke* (1), where the head landlord's reversion never had attached to it the occupier's tenancy. The case is quite free from the decision in *Allen* v. *Derby* (2), where the sub-tenant was held estopped because he had taken defence to an ejectment, and there was an existing decree against him unappealed from, and as I understand that case, the question we have to deal with is expressly saved in *Allen* v. *Derby* (2). Cases of ejectment for rent are open to different considerations, and I give no opinion upon them.

Nor is the case affected by the decisions in *Massy* v. *Norse* (3), and *Moylan* v. *Finch* (4), which rest on this that the party against whom the yearly tenancy was set up claimed by title paramount; there was no existing and continuing reversion to which the yearly tenancy could be attributed; the succeeding owner and alleged landlord was a succeeding owner, who claimed by title paramount to the estates of all. Here it is not alleged that the estate of the superior landlord is not existing and continuing.

(1) 14 L. R. Ir. 97; 455 (App.).
(2) 16 L. R. Ir. 346; 351 (App.).
(3) 20 L. R. Ir. 57; 464 (App.).
(4) 28 L. R. Ir. 595.

Appeal. 1893.

WEST, *Landlord*; HUGGARD, *Tenant.*

Walker, C.

The very point is put by Lord Justice Fitz Gibbon in *Massy* v. *Norse* (1), "under the 15th section, if there is a tenancy between A and B, and an under-tenancy between B and C, and if during C's tenancy the tenancy between A and B comes to an end, B's estate drops out, and, by a sort of novation, a tenancy is created between A and C in place of that previously existing between B and C; but there in each case the relation of landlord and tenant subsists between the parties."

I am of opinion that the case is ruled by *Seymour* v. *Quirke* (2) —a more difficult one than that before us; and further, if *Seymour* v. *Quirke* (2) had not been decided, that it is within the policy and the words of section 15.

FITZ GIBBON, L. J.:—

I concur. I think this case is governed in principle by *Seymour* v. *Quirke* (2), and I wish to state that principle as I understand it, and to give my reasons for holding that it applies to the present case.

We have to determine the scope of section 15. Two constructions of that section have been put forward. The first and narrower construction is that it applies only to cases where the estate of the immediate landlord determines during the continuance of a tenancy from year to year which, independently of the Land Acts, does not drop with the middle interest, but continues on. The subsequent words which confer the relation of immediate landlord on the next superior landlord "during the continuance of such tenancy" seem to lend great weight to this, which I may call the landlord's construction of the section. But I have already pointed out in *Seymour* v. *Quirke* (2), that this argument would nullify the section. If the only sub-tenancies to which section 15 applies were those which would, *proprio vigore*, continue, notwithstanding that the middle interest had determined, it would be a mere platitude to say that during their continuance the next immediate landlord should come into immediate relation with the occupying tenants.

The second construction is that where the estate of a mesne

(1) 20 L. R. Ir. at p. 467. (2) 14 L. R. Ir. 97; 455 (App.).

landlord determines during the existence of a tenancy from year to year as between an occupying tenant and that mesne landlord, forthwith, by the operation of the section, that tenancy from year to year shall attach to the next superior estate, and the relation of landlord and tenant shall thenceforth subsist immediately between the occupying tenant and the next superior landlord, and shall continue so long as the tenancy lasts. In other words, the mesne interest falls out, and the other two parties become landlord and tenant directly as between themselves. While I think that this is the true construction, and while I believe it to be already established by authority in this Court, I do not minimise the difficulties that stand in its way, nor the fact that the judgment of this Court by which it was laid down was not unanimous.

But the only difference between this case and *Seymour* v. *Quirke* (1) is this—the occupying tenant there was a lessee whose lease fell with that of the middleman, but who, under section 21, was to be deemed to be a tenant from year to year, while here the tenant was at the time of the determination of the middle interest actually and in fact a tenant from year to year. Therefore we can make no distinction between the two cases unless we hold that an occupier who is "deemed to be" a tenant from year to year is better off than one who actually is a tenant from year to year. I understood the decision in *Seymour* v. *Quirke* (1) to rest on the ground that section 21 gave the occupying under-lessee, at the simultaneous expiration of his lease with that of the middleman, the hypothetical *status* of a tenant from year to year, and that section 15 attached this supposed tenancy from year to year to the estate of the superior landlord instead of the mesne landlord, whose lease was at an end. If this be so, we cannot give the benefit of the section to a person who is only masquerading in the statutory character of a tenant from year to year, and refuse it to the real Simon Pure.

It may be well to note the strict limits within which, so far as authority goes, this principle has been as yet recognized. In no case yet has the tenancy been held to continue, unless we have first an "immediate landlord"; second, a "next superior landlord";

(1) 14 L. R. Ir. 97; 455 (App.).

Appeal. 1893.

WEST, *Landlord;* HUGGARD, *Tenant.*

Fitz Gibbon, L.J.

and, third, a "tenant of the tenancy," who, either in reality, or under section 21, is a tenant from year to year of a holding within the Act. Unless these three characters co-exist, and unless the relation of landlord and tenant exists between each pair of them, at the determination of the mesne estate, we have not yet held that section 15 can apply. This distinguishes such cases as *Massy* v. *Norse* (1), where the relation of superior landlord and mesne landlord did not exist. There may be successive landlords, or owners of successive estates, or claimants by title paramount, to be dealt with hereafter, but unless they are landlords and tenants to each other, *Seymour* v. *Quirke* (2) and this case will not help them. It is possible that difficulties of another kind may arise where the terms of the tenancy attached by the statute to the estate of the superior landlord, are, or may be, repugnant to those under which the mesne tenant held.

BARRY, L.J., concurred.

Solicitor for the tenant: *Huggard.*
Solicitors for the landlord: *MacGillicuddy & Morphy.*

G. Y. D.

(1) 20 L. R. Ir. 57; 464 (App.). (2) 14 L. R. Ir. 97; 455 (App.).

IN RE TRALEE AND DINGLE LIGHT RAILWAY CO. (1).

Q. B. Div. 1893.
Nov. 10.
Dec. 12.

Tramways and Public Companies (Ireland) Act, 1883—*Baronial guarantee—"Expenses of working and management"—Damages recovered against a Guaranteed Railway Company for negligence.*

Expenses of working and management (within section 4 of the Tramways, Ireland, Act, 1883) include damages recovered against a Railway Company for injuries arising from negligence or default in the conduct of the business of the Company.

Reg. v. *Treasurer, Co. Cork* (24 L. R. Ir. 415) approved and followed.

CERTIORARI.

The Tralee and Dingle Light Railway Co. was constructed under the Tramways (Ireland) Acts and the Tralee and Dingle Light Railway Order, 1888; and, by a presentment of the Grand Jury, and a resolution of the Town Commissioners of Tralee, duly confirmed, a dividend of 4 per cent. per annum on the paid-up capital of the Company (limited to £120,000) was guaranteed by certain baronies, and by the sanitary district of Tralee, which were thereby made liable for the completing, working, and maintaining of the undertaking.

The certificate for the half-year ending 31st May, 1893, of the arbitrators duly appointed by the Board of Trade, ascertained that the gross receipts of the Company amounted to £2374 5*s.* 8*d.*, and that the expenses of management and working and proper maintenance of the undertaking amounted to £4596 10*s.* 9*d.*, and that, in addition to the latter sum, the Company had paid various sums (set out in detail) on foot of civil-bill decrees and affirmances, obtained against the Company for injuries to persons and to cattle, caused by the negligence of the Company and its servants; and the arbitrators "believing said sums, amounting to £128 3*s.* 7*d.*, to come within the meaning of the words 'management and working expenses'" ascertained and certified that the gross

(1) Before HARRISON, GIBSON, and MADDEN, JJ.

Q. B. Div. 1893.

In re Tralee, &c., Light Rail Co.

expenses for the management, working, and proper maintenance of the undertaking amounted to £4724 14*s.* 4*d.*; and accordingly that for said half-year the sum of £4750 8*s.* 8*d.* was payable, and to be contributed towards the dividend on the paid-up capital of the undertaking (£2400) (1), and towards the working expenses and maintenance (£2350 8*s.* 8*d.*) under the presentments and order in council, by the baronies chargeable therewith, in ascertained proportions.

The Grand Jury sought, by *certiorari*, to remove and quash the certificate, on the ground that, as to the item of £121 15*s.* 4*d.*, [*i. e.* £128 3*s.* 7*d.*, less the amount chargeable to the Town Commissioners of Tralee], the certificate was made without and in excess of jurisdiction, and that, in including the sum of £121 15*s.* 4*d.* as expenses of the management working and proper maintenance of the undertaking, the determination of the arbitrators was erroneous in point of law.

George Wright, *Q.C.*, and *D. M'Carthy Mahony*, for the secretary of the Grand Jury.

Morphy, for the Railway Company.

[The following authorities were cited:—The Tramways and Public Companies (Ireland) Act, 1883 (46 & 47 Vict. c. 43); *Reg.* v. *Treasurer, Co. Cork* (2); *Re S. Llanharran Colliery Co.* (3); *Bouch* v. *Sevenoaks, &c., Railway Co.* (4); *Re, Waterford, &c., Railway Co.* (5); *Clifford* v. *Imperial Brazilian, &c., Railway Co.* (6); *Stuart's Trusts* (7).]

Cur. adv. vult.

Dec. 12.

Gibson, J.:—

The question raised on the application for a *certiorari* is, whether damages recovered against the Company in actions for negligence form part of the expenses of management and working within the statute of 1883, it being admitted that, in the case of

(1) Half-yearly dividend of 4 per cent. per annum on the paid-up capital, £120,000.
(2) 24 L. R. Ir. 415.
(3) 12 Ch. Div. 503.
(4) 4 Ex. Div. 133.
(5) 5 L. R. Ir. 102.
(6) 60 L. T. (N. S.) 60.
(7) 4 Ch. Div. 213.

an ordinary company they would unquestionably be treated as included in such expenses. A decision either way is attended with immense consequences. If such damages are included in the term "expenses," a crushing burden is thrown on the baronies; on the other hand, if they are excluded, the right of guaranteed shareholders may be seriously affected, and the statutory machinery is thrown into inextricable confusion. I have considered the question apart from the previous decision by this Court (1), with an anxious desire to discover any tangible or reasonable doubt as to the meaning of the statute, which has always appeared to me absolutely clear. "Expenses of working and management" must include damages resulting from negligence or default in the conduct of the business of the Company, and I cannot conceive that any other construction of the statute is possible. The arbitrators were right, and there was no excess of jurisdiction. The conditional order must be discharged, with costs.

HARRISON, J.:—

My brother Madden and I concur. The authority of *The Queen* v. *Treasurer, Co. Cork* (1), which was heard before a full bench of this Court, practically decides the case, and is conclusive upon this Court. Even independently of that authority, I have no doubt upon the matter.

Solicitors for the Grand Jury: *F. C. Downing & Sons.*
Solicitors for the Railway Company: *Huggard & Willington*

A. E. R. J.

(1) 24 L. R. Ir. 415.

Q. B. Div. 1893.

Dec. 19.

GUARDIANS NEW ROSS UNION to COLFER (1).

Costs (solicitor and client)—Agreement for special remuneration of country solicitor personally attending trial or argument in Dublin.

Per Harrison and Holmes, JJ. (*dubitante* Gibson, J.):—A country solicitor may contract with his client for special remuneration for his personal attendance in Dublin on the trial of an action or on a law argument. Such contract must be clearly shown to have been entered into by the client with full knowledge of its effect, and to be in itself just and reasonable (2).

Motion to review taxation of costs as between solicitor and client, instituted on behalf of Mr. J. R. Colfer, solicitor, of New Ross, county Wexford, solicitor to the New Ross Board of Guardians, in regard to—1, an item of £9 9*s.* for special attendance (three days) in Dublin, upon the re-argument of a case stated (3) by the Lord Chief Baron upon a civil-bill appeal, heard at Wexford Summer Assizes, 1890; and, 2, an item of £1 13*s.* 6*d.* for travelling expenses to Dublin and back on the same occasion.

Master Davis allowed £2 2*s.* only in respect of the first item, and disallowed the second. To this Mr. Colfer made objection, on the ground that it was for the convenience and advantage of his clients that their solicitor should reside at New Ross, and that, by a resolution of the 16th January, 1892, they unanimously ordered that he be instructed to attend in Court, at the re-hearing of the law argument in this case, they having been previously informed by him by letter that the matter in dispute was entirely a question of law, but that it was possible that the Judges might require some information which could not readily be given except by him. Mr. Colfer stated that otherwise his town agent would have attended for him, and urged that he himself had special engagements in county Kilkenny, in the Land Commission Court for the same days.

(1) Before Harrison, Holmes, and Gibson, JJ.

(2) Cf. *In re Cramsie and Greer* [1894], 1 Ir. R. 135.

(3) *New Ross Union* v. *Byrne*, reported 30 L. R. Ir. 160.

The Master overruled the objection, stating that he had allowed a fee of £2 2*s.* for attendance, disallowing the remainder of the charges, and adding:—"The plaintiffs' solicitor resides in New Ross, and alleges that he had the guardians' written instructions to attend in person. I consider it was no more than his duty to attend in person when so required by his clients, and that such attendance does not entitle him to special fees. It has never been the practice to allow special fees to country solicitors coming to Dublin to attend their clients' business. They are registered Dublin solicitors, and can have no charges beyond the fees and charges allowed by the schedule of fees for attendance in Dublin. Any contrary practice would lead to large additional expenses to suitors in affording an opportunity to country solicitors coming to Dublin at special fees to attend every case they might consider of importance, for which attendance the clients' request could be easily obtained. In this case the costs are not purely costs against a client; they are in the nature of trustees' costs, being costs of guardians of the poor—not personal, but coming out of the rates. The actual necessity and importance for the personal attendance of a solicitor in Dublin, on a trial or hearing, or for any other purpose, at a special fee, should be shown on the merits and not claimed merely on a direction of the client to attend in person; such a direction might not have in contemplation that special fees would be charged, but might merely express a desire that the solicitor should attend in person. In the case of *Caraher* v. *Great Northern Railway Company* (1), on objection to taxation the Exchequer Division by order (23rd February, 1891), affirmed the disallowance of the £5 5*s.*, a-day to the solicitor in costs taxed as between solicitor and client against the defendant under a consent order. The case does not appear to have been reported, but the costs and orders are of record in this department. In the case of *Martin* v. *Great Northern Railway Company* (1), also in the Exchequer Division, the solicitor for the plaintiff, in costs between solicitor and client taxed by me, claimed £22 1*s.* attendance fee, and £2 expenses for attending the trial at special request. I disallowed the charges; he objected; I gave reasons for the disallowance; and

(1) Unreported.

Q. B. Div. 1893.

GUARDIANS, NEW ROSS UNION to COLFER.

the Court affirmed my taxation. In the same case the solicitor charged £3 3*s.* and £1 1*s.* for coming to Dublin to attend taxation, which I disallowed, and from this he did not appeal. The solicitor's application in that case was refused with £5 5*s.* costs, by order dated 2nd November, 1892; the costs have not since been certified."

Matheson, Q.C., for Mr. Colfer :—

Although the amount actually involved was not large, the decision was a matter of considerable importance, affecting the validity of the entire rate made in the Union for the year 1889-90. Upon the first argument of the Case Stated (19, 20, and 23, November, 1891), Mr. Colfer attended in person; but, as he had other business in Dublin, no special fees for this attendance were charged. The Lord Chief Justice having subsequently intimated that the case should be re-argued before the full Court, Mr. Colfer wrote to the Clerk of the New Ross Union the following letter :—

NEW ROSS, 16*th January*, 1892.

(*Guardians* v. *Byrne.*)

DEAR SIR,—. . . The above case is specially fixed for the 20th inst. to be re-argued before the full Court of the Queen's Bench Division. Although the matter in dispute is entirely a question of law, it is quite possible that the Judges may require some information which could not readily be given except by myself. The Guardians may therefore deem it well to direct my personal attendance in Court, and if so I will thank you to get an order made to that effect, because otherwise I would not be entitled to the costs of such attendance. I may add that it is no pecuniary advantage to me to attend the hearing of the case, but rather an inconvenience, owing to engagements at the Land Appeal Court in Kilkenny on same day. But if the Guardians wish me to attend I shall try to make other arrangements for my business in Kilkenny.

Yours, &c.,

J. R. COLFER.

To this the Clerk of the Union, Mr. Pope, replied :—

NEW ROSS UNION, 16*th January*, 1892.

Resolution adopted as an order of the Board at the Guardians' meeting on this date :—Ordered unanimously, "That our solicitor, Mr. John R. Colfer, be instructed to attend the Court at the re-hearing of the legal argument next

week in the case of the Guardians *v.* J. E. Byrne, and he is requested to furnish the necessary documents or information to the Commissioners of Valuation, as well as the Local Government Board, respecting the case."

P. A. POPE,
Clerk of the Union.

Q. B. Div. 1893.

GUARDIANS, NEW ROSS UNION *to* COLFER.

Mr. Colfer attended accordingly at the hearing, which occupied two whole days, and charged £3 3*s.* a-day for these, and for another day occupied in travelling (though the journeys occupied the greater part of two days), and for travelling expenses out of pocket.

The English decisions, *Re Forster* (1), *Re Storer* (2), and *The Soto* (3), show that the Taxing Master acted upon a wrong principle. The solicitor's attendance in person was necessary for the proper conduct of the case, and he had obtained a formal direction from his clients, after having given them distinctly to understand that a special fee should be charged. [GIBSON, J.: But in Ireland are not solicitors supposed to be in attendance in the Courts in Dublin, while in England town business is transacted in the London agent's own name? This may render the English decisions inapplicable.] That depends upon a legal fiction. It would be impossible for the guardians to employ a solicitor who did not reside at New Ross. *The Belfast Harbour Commissioners* v. *Lawther* (4) is a similar case to the present; and *M'Namara* v. *Malone* (5) shows that where a Dublin solicitor attends on the trial of a case at Assizes in another county he is entitled (under the General Orders of 1882, Schedule item No. 29), to charge the ordinary fee of two guineas a-day for each day necessarily occupied.

HARRISON, J.:—

The motion in this case should, in my opinion, be granted, and Mr. Colfer's claim for three guineas a-day for the three days necessarily employed in attending upon this case, and for his travelling expenses, should be allowed. The case itself occupied

(1) 8 Ch. Div. 598.
(2) 26 Ch. Div. 189.
(3) [1893] P. 73.
(4) 17 Ir. Ch. Rep. 147.
(5) 18 L. R. Ir. 269.

Q. B. Div. 1893.

GUARDIANS, NEW ROSS UNION *to* COLFER.

Harrison, J.

two full days, and Mr. Colfer had to come up from New Ross—a place not very easy of access—and the length and difficulty of the journey rendered it impossible for him to arrive in time unless he had travelled upon the previous day.

The matter is one of importance. It is a claim made for costs as between solicitor and client, for fees larger than those which the Taxing Master can allow in ordinary cases; for, under the Rules and Schedule, the maximum fee in ordinary cases, supposing that a solicitor was resident in Dublin, in fact or in fiction, would be one guinea. The case itself was a law argument, upon a special case reserved by the Chief Baron, on a matter of great consequence to the Guardians of this Union, and to the public at large, namely, the liability to taxation of unoccupied houses—buildings upon a farm which had been evicted and which had been taken up by the owner. There was no distinction made between the poor-rate upon the houses and upon the land; and, having regard to the decision in *Armstrong's Case* (1), Byrne submitted to pay the rates upon the land, but resisted so far as the houses were concerned, as they were unoccupied. The case was twice argued before this Court—in the first instance before three Judges as an ordinary Case Stated. It was considered, however, to be of such importance that directions were given that it should be re-argued before the full Court, and it was, in fact, re-argued before seven Judges, and the Court decided that Byrne was right, *qua* the houses. Though the amount at stake in the particular case was small, the principle involved was a serious one. At the first hearing, Mr. Colfer, the Guardians' solicitor, happened to be in Dublin at the time, and was in attendance; and, when subsequently he saw the notice in the paper that the case would be re-argued, he adopted a course which was most creditable to himself, and most satisfactory and reasonable. He apprised his clients that the re-argument would come on; he knew and they knew that, whether they approved of his attendance in Dublin or not, and whether a solicitor was properly attending in Dublin or not, no costs for such attendance could be allowed upon taxation without the client's special order. Having this before him, and

(1) 16 L. R. Ir. 33.

knowing the law, as he must be assumed to do, he wrote them the letter of the 16th January, and the Board, having this letter before them, passed a resolution, which was a distinct adoption of the suggestion made in his letter, that it might be well, in their interests, that he should attend. He had pointed out to them that it was no personal benefit to himself, but quite the reverse. He acted upon his experience, knowing that, although it was purely a law argument, the Court might require information as to facts, which he alone might be in a position to offer. I entirely agree with him in the view which he took. Even if no information were absolutely required, some member of the Court might raise some point or ask some question, and remark upon the fact of the solicitor's absence; and I think that it was the Guardians' duty to have someone here to answer any questions, if any point arose.

Now in this case I go upon the ground that there was a special contract entered into by the Board of Guardians with their solicitor, with full notice and knowledge of the facts. I think that Mr. Colfer acted properly in advising them as he did, seeing that the argument was coming on. If he had not attended, and the decision had gone against the Guardians (which was the actual result), he would have been much to blame. However, they ratified the reasonable suggestion which he had given, and I think that his claim for costs should be allowed.

The Taxing Master appears to have thought that in no case should there be a special fee allowed to Mr. Colfer; but that would be to lay down a principle that in no event could such a special contract have any force. It is stated that the Guardians, whose solicitor Mr. Colfer is, stand in the position of trustees. No doubt that is so, but it does not push the case further against the solicitor. If there was any remission by the Guardians of their duty, a different rule might apply; but there was no such remission; and it was, in my opinion, for the interests of the ratepayers that due care should be taken to have their case properly presented to the Court which had to decide upon their rights. The case is within the reasonable application of the rule as between solicitor and client and the application should be granted.

Q. B. Div. 1893.

GUARDIANS, NEW ROSS UNION *to* COLFER.

HOLMES, J. :—

I concur, upon the ground that a solicitor and client are at liberty to contract that the solicitor shall receive special remuneration for his *personal* attendance, either at the trial of an action, or the hearing of a law argument, and that such a contract has been established in the case before us. I do not accept the view that a solicitor is bound to be *personally* in attendance upon every occasion on which an action in which he is retained comes before a Court. Whether he ought to be present in person, or whether it is sufficient to send a representative, depends upon the nature of the proceeding and the circumstances of the case. Where counsel is employed, the common usage is that the case is looked after in Court by a managing clerk or assistant; and if the agent thus employed is competent, the client would have no just grounds of complaint. But a cautious or anxious litigant may desire to have his solicitor on the spot, and I am not aware of any objection to his securing this by contracting to give him special remuneration.

I quite admit that a contract of this kind must be carefully examined. I would require clear evidence that it was made with full knowledge on the part of the client of its effect and consequences; and I would also require to be satisfied that it was just and reasonable in itself.

In the present case Mr. Colfer fairly and truly informed the Board of Guardians by letter of all that was necessary to enable them to come to a sound conclusion. Anyone reading the letter would know that his personal attendance at the argument in Dublin would be out of the ordinary course of his duty, that it could only be secured by giving him special remuneration, and that such special remuneration would fall upon his own clients, whatever might be the result of the case. Under these circumstances, the resolution was passed directing him to attend; and I am of opinion that although his personal attendance was not necessary, it was under the circumstances a prudent thing for his clients to provide for it.

For these reasons, I am of opinion that he is entitled to special remuneration. The question remains as to the amount; and if

the charge were a large one, the proper course would doubtless be to send it back to the master for him to fix it; but in a small matter like this, we may decide it at once, and I agree with my brother Harrison that the sum claimed is reasonable.

GIBSON, J.:—

In this important case, which has unfortunately to be disposed of *ex parte*, the present impression on my mind is that there is not enough before the Court to justify it in departing from the established practice as stated by the Taxing Master. He says:—"It has never been the practice to allow special fees to country solicitors coming to Dublin to attend their clients' business. They are registered Dublin solicitors and can have no charges beyond the fees and charges allowed by the schedule of fees for attendance in Dublin." The present case was one of final argument or hearing and not one of interlocutory application. If in his absence his clients' case would have been prejudiced, the solicitor might have incurred responsibility. Whether or not, under particular circumstances, a special signed contract may be entered into, either as to extra fees for attendance, in addition to what the rules allow, or for other payments, is a matter of a large and difficult character. The contract must, of course, be entered into with full knowledge that the fees cannot be taxed against the party, and must be fair and reasonable; but can a solicitor enter into a contract with his client that his client shall pay for attendance which the rules contemplate shall not be the subject of charge, or for additional remuneration greater than the rules prescribe; and what is the consideration for such contract? If he can make a bargain for coming to Dublin, he may also bargain (it may be argued) as to the amount of the remuneration; and necessity might compel the client to accede to the demand. I do not propose to offer any final opinion upon this point without further inquiry and consideration. It is to be remarked that in this case the persons who are the clients are not opposing the demand, which in a moral point of view is fair and just; and I am not to be taken as throwing the slightest doubt upon Mr. Colfer's thorough

Q. B. Div. 1893.

GUARDIANS, NEW ROSS UNION to COLFER.

Gibson, J.

honesty and rectitude in the transaction. It may be a matter for consideration whether such a corporation as the Guardians, in assenting to their solicitor's suggestion and thereby throwing upon their ratepayers an additional burden of costs, are acting within their powers or not; or whether, upon taxation as between solicitor and client, the Master can go beyond the client's desire, and say that the Board must be taken to be trustees. This question is not covered by any authority mentioned in argument. The Board may possibly be in the same position as individuals, and, if acting *intra vires* and not *mala fide*, may be at liberty to assent to the charge.

Without actually dissenting from the opinion of the other members of the Court, I do not wish to bind myself by a final expression of opinion, though at present I am inclined rather to think that what is represented as the existing practice should remain undisturbed.

Solicitor: *J. R. Colfer in person.*

A. E. R. J.

REG. (ALTON) *v.* M'AULIFFE.

SAME *v.* SAME.

Gibson, J.
1893.
July 17.
Oct. 20.

Fishery Acts—Prosecution under 32 & 33 Vict. c. 92, sect. 16—13 & 14 Vict. c. 88, sect. 53.

On appeal under 13 & 14 Vict. c. 88, sect. 53, a very strong case must be made to justify mitigation of the penalty prescribed by the statute.

Semble: There is no jurisdiction to reduce the statutory penalty at all.

Remarks on *Doran* v. *Cunningham* (20 L. R. Ir. 544).

APPEALS to the going Judge of Assize, heard before Gibson, J., at Ennis (Co. Clare Summer Assizes, 1893), against two orders—the one of conviction, the other of dismissal, made by the Justices of Co. Clare, sitting at Petty Sessions, holden at Knock, upon two complaints under 32 & 33 Vict. cap. 92, sect. 16, against Synan M'Auliffe, as defendant, for illegal fishing. Judgment was reserved, and given in Dublin.

Brereton Barry, for the complainant.

Redmond Barry, for the defendant (1).

GIBSON, J.:— Oct. 20.

In this case the defendant was convicted of having used a stake net in the River Shannon on February 24th, 1893, without having obtained the prescribed certificate, and he was accordingly fined £50, and a further penalty of £20, for the day the fixed engine was erected and used. The case was clearly proved, and on the appeal before me the only question raised was as to abatement of the fine.

No objection was made as to the appeal lying, or as to the jurisdiction. No statutory provision enabling any mitigation to be made was relied upon.

(1) The appeal from the order of conviction was wholly or mainly brought with a view to obtain a mitigation of the penalty imposed; and, for the purposes of this report, the facts appear sufficiently from the judgment.

Gibson, J.
1893.
THE QUEEN
v.
M'AULIFFE.

Even if I had jurisdiction to abate the statutory penalty (which I much doubt, having regard particularly to 13 & 14 Vict. c. 88, s. 53), a very strong case should be established to justify mitigation below the sum prescribed by the statute. No such case is made out, and I accordingly affirm the conviction.

In the second case, the appeal was by the prosecutor, who had been dismissed in the Court below. The Kilkerrin weir, which was the subject of the prosecution, was challenged on three grounds—1, that it was not on the site authorized by the certificate; 2, that it was not of the character authorized, being a drift net instead of a stake net; 3, that it was of greater dimensions than authorized. The second and third points were clearly established; and I incline to think that on the first ground the defendant was also in the wrong. Why he was not convicted I do not know. He should have been; and I reverse the dismiss and award a conviction, with the statutory penalty of £50 and £20 for the day the net was used, February 24th.

No ground is made out for reducing the penalties. Fixed nets are against common right, and Parliament has imposed severe fines on those who use them unlawfully. Even if a case were made out of innocent and trivial mistake, I doubt that I have power to abate the prescribed penalty if it once attaches. As in the former case, no question of jurisdiction was raised on either side. I give no costs in either case. Counsel stated that, in the case before Mr. Justice O'Brien, *Doran* v. *Cunningham* (1), where he mitigated the penalty, the matter was left to his discretion by the consent of the parties and the question of jurisdiction was not argued.

Solicitor for complainant: *Hilliard.*
Solicitor for defendant: *T. Lynch.*

A. E. R. J.

(1) 20 L. R. Ir. 544. [See Molloy's Justice of the Peace, p. 241; *M'Gann* v. *Kelly* [1894] 2 Ir. R. 8.—REP.]

M'GROREY *v.* CHAMBERS (1).

(BROWN'S CASE.)

Appeal.
1893.
Nov. 6, 7.

Parliamentary franchise— Registration of voters— Borough — Signature of claimant to notice of claim—Name on list of claimants—Jurisdiction of Revising Barrister.

If a notice of claim be received by the Town Clerk in a borough, and the name of the claimant be duly inserted in the list of claimants, it is not competent to the Revising Barrister to inquire into the circumstances under which the claimant's signature was attached to the notice of claim.

APPEAL by the objector John M'Grorey against the decision of Mr. Teeling, one of the Revising Barristers for the borough of Londonderry, declaring the respondent entitled to the franchise.

The facts appear from the Case Stated, which was as follows :—

"At a Court for the revision of the lists of Parliamentary voters for the borough of Londonderry, held before me in the said city on the 15th September, 1893, and succeeding days, up to and including the 16th October, 1893, the following proceedings took place :—

"1. The names of the several persons set out in the schedules hereto appeared in the Town Clerk's List (No. 21) of persons claiming in the year 1893, out of the South and Waterside Divisions of the borough of Londonderry, to have their names inserted in the lists of persons entitled to vote in the election of a Member of Parliament for the said borough, in respect of being rated occupiers of lands, tenements, and hereditaments within the borough, rated at the net annual value of £10 and upwards, or as inhabitant householders, by virtue of the household qualification created by the Representation of the People Act, 1884.

"2. All the persons named in the said schedules were duly

(1) Before SIR PETER O'BRIEN, C.J., PALLES, C.B., and FITZGIBBON and BARRY, L.JJ.

Appeal. 1893.

M'GROREY v. CHAMBERS.

objected to by the appellant, John M'Grorey, of 23, Margaret-street, Londonderry.

"3. At the hearing of the cases before me, all the persons whose names are set out in the schedules hereto proved that, save in respect of the signature to the notice of claim, they were, respectively, properly qualified as such rated occupiers, or inhabitant householders, to be inserted in the registry of persons entitled to vote in the election of a Member for the borough, and so far as such qualification is concerned, it is not disputed that each of said persons proved his claim as required by section 37 of the Registration (Ireland) Act, 1868 (31 & 32 Vict. c. 112).

"4. The appellant, however, contended that each claimant was bound to prove, in addition to his qualification, the further fact that he had signed his claim as provided by section 14 of the Representation of the People (Ireland) Act, 1868 (31 & 32 Vict. c. 49). He contended further that such signature must be made by the claimant with his own hand, and that no authority he could give would validate his signature by another person; and in case signature by a duly authorized agent should be deemed sufficient to safisfy the section, he further contended that such authority to sign for a claimant must be given to the agent before the claimant's signature was affixed, or notice of claim was given to the Town Clerk, and that in no case could a claim signed without previous authority be ratified or adopted by the claimant after the affixing of the signature, and giving of notice so as to be a compliance with the above section.

"5. The claimants, on the other hand, contended that it had been the practice in Londonderry for many years in such cases for the registration agents to sign the notices of claim in the names of the claimants, and on their behalf without any authority from them; that they were put on the Town Clerk's list of claimants in the same manner as in former years; and that I had no jurisdiction to inquire into the fact of signature, or to reject the claims for want of proper signature, but was bound to take the Town Clerk's list of claimants (No. 21) as I found it, and to admit to the franchise every person on the list who proved himself otherwise duly qualified for the franchise.

"6. I was of opinion that the statute required the personal

signature of a claimant to validate his claim, but I was also of opinion, and so decided, that I had no jurisdiction to inquire into the question of signature where the claimant was on the Town Clerk's list of claimants (No. 21). At the request of the appellant, however, I inquired into the fact of each signature, so as to be able to report the circumstances of each case to the Court of Appeal, which I now do.

"7. No person named in either of the schedules hereto signed his notice of claim with his own hand. Each of the persons named in the first schedule before signature gave verbal authority to an agent to sign his name to the notice of claim for him, and have it sent in to the Town Clerk on his behalf. The claimant was not present when the agent so authorized signed his name to the claim. None of the persons named in the second schedule gave any authority to the registration agent, or to any other person to sign or send in a notice of claim in his name, and the notices of claim for such persons were signed with their respective names, and sent in to the Town Clerk by the registration agent without authority. Each of the persons named in the first and second schedules appeared in Court before me at the revision of said list by the common party solicitor, and each gave, or caused evidence to be given, in support of the notice of claim so signed and given as aforesaid, and proved the qualification stated in said notice of claim, and published in said list, and I accordingly retained their names on said list for insertion in the list of voters.

"8. If I was wrong in deciding that I had no jurisdiction to inquire whether said notices of claim were duly signed, and if, where a claimant is duly objected to it must be proved in the Revision Court that every notice of claim must be signed with the claimant's own hand, or by some authority other than that herein before mentioned, then the Court will expunge from said list all the names in both schedules hereto.

"9. If I was wrong as to jurisdiction, and if a notice of claim signed for the claimant by an agent, verbally authorized before signature to do so, is valid, and one signed without any antecedent authority, but subsequently adopted in Court in the manner hereinbefore mentioned, is invalid, then the persons named in the second schedule hereto should be expunged from the said list.

Appeal. 1893. M'GROREY v. CHAMBERS.

"10. The said John M'Grorey having given notice of appeal in all the said cases, I declare that all the said appeals ought to be consolidated, and the said John M'Grorey so consenting, I name him to be the appellant in such consolidated appeal.

"11. I name Robert N. Chambers as, and being Town Clerk of the borough of Londonderry, to be respondent to this appeal."

Healy, and *M. J. Kenny*, for the appellant :—

Davies v. *Hopkins* (1) no doubt decided that giving a notice of claim in a county to the proper officer is a matter entirely between the claimant and the officer, and if the officer puts the name of the claimant on the claimants' list, the Revising Barrister has no jurisdiction to make the claimant prove his notice of claim. But the law in boroughs is different; and *Davies* v. *Hopkins* (1) does not apply to a borough. The provisions of the Parliamentary Voters (Ireland) Act, 1850 (13 & 14 Vict. c. 69), relating to counties are quite distinct from those relating to boroughs. Section 22 requires that the claim of a person seeking the franchise in a county shall be signed by him. This section does not apply to boroughs, which are dealt with by section 34—a section which says nothing whatever about the signature of claims. A change was made by 31 & 32 Vict. c. 49, s. 14, which requires that every notice of claim to be registered as a voter for any borough shall be signed by the person making such claim, thus assimilating the law on this point as regards counties and boroughs. But the Legislature went further in the same year; for by 31 & 32 Vict. c. 112, s. 37, it provided that every claimant must prove that he has made a claim. Thus the Legislature has practically overruled *Davies* v. *Hopkins* (1).

It must be borne in mind that a "list of claimants" is not a "list of voters" in a borough : it is otherwise in a county; because, by section 24, of 13 & 14 Vict. c. 69, it is expressly enacted that "list of voters" in a county includes "list of claimants." There is no such provision relating to a borough. Consequently in a borough the list of claimants is but a catalogue of claimants to be dealt with by the Revising Barrister under section 53 of the same

(1) 3 C. B. (N. S.) 376.

Act, which prescribes that the Revising Barrister in a borough shall insert in any list of voters for such borough the name of every person omitted who shall be proved to the satisfaction of such Revising Barrister to have given due notice of his claim, and to be duly qualified. The scheme of section 53 shows that every person not on the voters' list who claims the borough franchise—whether he is on the claimants' list or not—must prove that he gave due notice of his claim. The form of section 52, which relates to counties, is wholly different.

The duties and powers of the Town Clerk are prescribed in ss. 33–38. No section enables him to inquire whether the claimant has signed his claim: he has no power to hold a Court and examine witnesses; even if he had this power the week, August 4 to August 11, allowed him for preparing the lists, would be quite inadequate to exercise it; no section enables him to write "objected" opposite to a name for want of signature to the claim; no section empowers him to omit the name of the claimant if he believes the notice of claim has not been signed by the claimant. The duty of rejecting a claimant for want of giving due notice of his claim is reserved for, and (by section 53), conferred upon the Revising Barrister. *Toms* v. *Cuming* (1) shows that the claimant should personally sign his claim.

In re Sale (2) is in conflict with *Davies* v. *Hopkins* (3), and will, as the more recent authority, be followed by this Court. *Pickard* v. *Baylis* (4) recognizes that in boroughs there is a distinction between a list of voters and a list of claimants for revision purposes.

[They referred also to *Leonard* v. *Alloways* (5); *Boon* v. *Moffett* (6); *M'Niffe* v. *M'Tiernan* (7); *Barnett's Case* (8); *Ford* v. *Corcoran* (9); *Meade* v. *Cooper* (10); *Mathews* v. *Magrath* (11); *Edwards* v. *Lang* (12); *Jones* v. *Beveridge* (13); *Conlan's Case* (14).]

(1) 7 M. & G. 88.
(2) Colt. Reg. Cas. 152; 50 L. J. (C. P. D.) 113.
(3) 3 C. B. (N. S.) 376.
(4) 5 C. P. D. 235.
(5) 2 H. & C. 411.
(6) 3 Ir. C. L. R. 189.
(7) *Ibid.* 186.
(8) 7 Ir. C. L. R. 369.
(9) 10 Ir. C. L. R. 539.
(10) Ir. R. 3 C. L. 125.
(11) *Ibid.* 127.
(12) *Ibid.* 137.
(13) 20 L. R. Ir. 382.
(14) Lawson's Notes, 1889–90, p. 24.

Appeal. 1893. M'GROREY v. CHAMBERS.

The Rt. Hon. J. Atkinson, Q.C., and *J. Cooke*, for the respondent:—

The provisions of 13 & 14 Vict. c. 69, regarding counties and boroughs, though contained in different sections, are practically identical. *Davies* v. *Hopkins* (1) applies equally to counties and boroughs: its binding effect has been recognized frequently in this country: *Meade* v. *Cooper* (2); *Mathews* v. *Magrath* (3); *Edwards* v. *Lang* (4); *Barnett's Case* (5); *O'Brien* v. *Fenton* (6). The binding force of the case is not weakened by 31 & 32 Vict. c. 49, s. 14, because that section only made it necessary for the claimant in a borough to sign his notice of claim; nor by 31 & 32 Vict. c. 112, s. 37, because that section only requires the claimant to prove his qualification, not his notice of claim. The effect of this latter section is thus stated by Baron Fitzgerald in *Meade* v. *Cooper* (2):—"As I understand that section, if the clerk has received the claim, the party is exempt from proving that he rightly made the claim." In *Boon's Case* (7), which arose in the city of Dublin, the notice of claim was not in the handwriting of the claimant, but the Town Clerk had put the name on the claimants' list; the Revising Barrister held the claim insufficient and expunged his name; the Court of Appeal reversed this decision.

Sections 52 and 53 must be read as applying to the same case—the former relating to counties and the latter to boroughs—viz. the omission by the officer of the claimant's name from the claimants' list. These sections enable a claimant whose name is so omitted to obtain the franchise, and section 54 enables an objector to object *ore tenus* to such a claimant either in county or borough.

Nothing turns upon the fact that the list of voters is the only list mentioned in section 54. This phrase includes "list of claimants." See the very form of notice of objection served in this case by the appellant on the respondent—Form No. 25 of Schedule 1 to 48 Vict. c. 17, in which the words "list of claimants," "list of persons entitled to vote," and "list of voters" are used interchangeably.

(1) 3 C. B. (N. S.) 376.
(2) Ir. R. 3 C. L. 125.
(3) *Ibid.* 127.
(4) *Ibid.* 137.
(5) 7 Ir. C. L. R. 369.
(6) 15 Ir. C. L. R. 380.
(7) 3 Ir. C. L. R. 189.

Sale's Case (1), is quite irreconcileable with *Davies* v. *Hopkins* (2), and will not be followed.

Sir Peter O'Brien, C.J.—

This case involves the right of some one hundred persons, whose names are mentioned in its schedule, to be retained on the list of voters for the Borough of Londonderry. We are told that two precisely similar cases have been stated by the other Revising Barristers for the same borough, so that the decision we are about to pronounce will rule the right to the franchise of some three hundred persons. It thus appears that the case is one of great importance.

The names of the several persons set out in the schedule to the case appear on the Town Clerk's List (No. 21) for the year 1893, of persons claiming the franchise in the Borough of Londonderry, either as rated occupiers or as inhabitant householders. All these persons were objected to by the appellant. Before the Revising Barrister these several persons proved that, save in respect of signature to the notice of claim, they were respectively properly qualified as rated occupiers or as inhabitant householders: and so far as the qualification is concerned it is not disputed that each of them proved his claim as required by section 37 of 31 & 32 Vict. c. 112. The appellant, however, contended that each claimant was bound to prove, in addition to his qualification, the further fact that he had signed his claim as provided by section 14 of 31 & 32 Vict. c. 49. He contended further that his signature must be made by the claimant with his own hand. The claimants, on the other hand, contended that it had been the practice in Londonderry for many years for the registration agents to sign the notices of claim in the names of the claimants, and on their behalf: that they were put upon the Town Clerk's list in the same manner as in former years: that the Revising Barrister had no jurisdiction to inquire into the fact of signature, or to reject the claims for want of proper signature, but was bound to take the Town Clerk's list as he found it, and to admit to the franchise every person on the list who proved himself

(1) Colt. Reg. Cas. 152; 50 L. J. (C. P. D.) 113. (2) 3 C. B. (N. S.) 376.

Appeal. 1893. M'GROREY v. CHAMBERS. Sir P. O'Brien, C.J.

otherwise duly qualified. The learned Revising Barrister, Mr. Teeling, yielded to this last contention, and decided that he had no jurisdiction to inquire into the question of signature when the name had been placed upon the list of claimants by the Town Clerk. We have now to decide whether the Revising Barrister was right in so holding.

Section 37 of 31 & 32 Vict. c. 112, seems to me to measure the obligation of the claimant. It is as follows:—"No person claiming to be entitled to vote at any election for a member or members to serve in Parliament for any county, city, town, or borough in Ireland, shall be registered by any chairman or revising barrister unless evidence be given to prove such claim." That is the measure of the claimant's obligation. He must give evidence to prove his "claim." What is the meaning of the word "claim" in this section? Clearly it means "qualification," "title to vote," and not the manner in which the claim is brought into court. In the case of rated occupiers and inhabitant householders the manner in which the claim is brought into Court forms no part of the qualification. In this respect the case of a lodger is different. But it plainly follows from the *ratio decidendi* of the cases in which it was held that making a claim was part of the lodger qualification, that the same principle does not obtain in the case of rated occupiers and inhabitant householders. The lodger cases, therefore, when rightly understood, so far from helping the appellant's contention, form a powerful argument on the other side. For it is only because making a claim forms part of a lodger's qualification, that a lodger claimant is put upon proof that he has made a claim in due form.

There is a case to which Mr. Atkinson has referred—*Meade* v. *Cooper* (1)—which, though I cannot say I adopt its conclusion, contains some valuable observations made by the Judges during the argument regarding the effect of section 37 of 31 & 32 Vict. c. 112. Mr. Justice O'Hagan, afterwards Lord O'Hagan, says (at p. 126):—"Under the old Acts, if the Town Clerk published the claim, and there was no objection served, the claimant *ipso facto* was entitled to be registered. I think the Legislature in-

(1) Ir. R. 3 C. L. 125.

tended by the 37th section to alter that and require him to prove his *qualification*. The 37th section first speaks of persons 'claiming to be entitled,' and then says they must 'prove such claim.'" Baron Fitzgerald says—a most apposite observation here:—"You assume that proof of the claim and proving that the party rightly made his claim are the same thing. As I understand that section, if the clerk has received the claim, the party is exempt from proving that he rightly made the claim." The actual decision in *Meade* v. *Cooper* (1) may be wrong, but I entirely agree with the interpretation put upon the section we are considering by those distinguished Judges.

It would appear to me, therefore, on reading the statute that the measure of the claimant's obligation before the revising authority is to prove his claim, using this word in the sense of qualification, and that he need not prove the manner in which his claim was made when placed upon the list as the claim here has been. Now, let us see farther how the matter stands upon the authorities. The respondent's counsel rely upon the case of *Davies* v. *Hopkins* (2). That case was decided by most eminent Judges, Cockburn, C.J., and Willes, J., taking part in its decision. They held that in the case of a county this question of being put upon the claimants' list was a matter between the claimant and the overseers; that it was not competent for the Revising Barrister to inquire into how the claim got on the list; but that in such a case the Revising Barrister has nothing further to consider than whether the claimant makes out that he is entitled to be registered as a voter in respect of the qualification described in the list. Willes, J., pointed out, at the end of his judgment, that the overseers were liable to indictment, if from any improper motive they put upon the list a person who had not given notice of his claim: thus there is ample remedy for any abuse that is likely to arise.

Has that case been overruled? It is said that *In re Sale* (3) is in conflict with it. Mr. Atkinson with great energy asserted that *In re Sale* (3) was diametrically opposed to *Davies* v. *Hopkins* (2).

(1) Ir. R. 3 C. L. 125.

(2) 3 C. B. (N. S.) 376; 27 L. J. (C. P.) 6.

(3) Colt. Reg. Cas. 152; 50 L. J. (C. P. D.) 113.

Appeal. 1893. M'Grorey v. Chambers. Sir P. O'Brien, C.J.

He wanted to show by emphasising the antagonism between the two cases how egregiously wrong Grove and Lopes, JJ., were in the later case. I think there is some confusion about *In re Sale* (1). There may be some class of lists we are not familiar with. During the argument Lord Justice Barry pointed out a passage in Rogers on Registration at p. 241, from which it would appear that the claim in that case was one which had been omitted from the list. In this connection, too, Lord Justice Fitz Gibbon has pointed out that Grove, J., says, "It is the *datum* of this case that the applicant is a person omitted from the list." Therefore, whatever the facts of the case were, it is plain that the *ratio decidendi* of the Judges was that the claim was omitted from the overseers' list.

I am therefore of opinion that there is no conflict between *In re Sale* (1) and *Davies* v. *Hopkins* (2); but even if there were, I should certainly follow *Davies* v. *Hopkins* (2). It has been approved in several cases in this country: first, in *Hughes* v. *Barnett* (3), in which all the Judges concurred in adopting it as good law. Again, in *O'Brien* v. *Fenton* (4), it is mentioned as a binding authority. In that case Baron Fitzgerald delivered the judgment of the Court, and said:—"We are of opinion that this case is ruled by *Davies* v. *Hopkins* (2) and by the cases which followed that decision in this country."

Taking *Davies* v. *Hopkins* (2) as being still the law, it decides that in a county the Revising Barrister must take the claim when it is put upon the list of claimants by the proper officer, and that his function is to inquire not how it got there, but whether the claimant possesses the requisite qualification.

Then it is said that *Davies* v. *Hopkins* (2) applies only to counties, and that a different rule must be adopted in boroughs, as section 24 of 13 & 14 Vict. c. 69, which makes a list of claimants in a county part of the list of voters, does not expressly extend to boroughs. But I think, having regard to the general frame of the Act 13 & 14 Vict. c. 69, that section 52, which deals with counties, and section 53, which deals with boroughs, both provide for the

(1) Colt. Reg. Cas. 152; 50 L. J. (C. P.) 6. (C. P. D.) 113.
(2) 3 C. B. (N. S.) 376; 27 L. J. (C. P.) 6.
(3) 7 Ir. C. L. R. 369.
(4) 15 Ir. C. L. R. 380.

same event, namely, the *omission* by the proper officer to enter upon the claimants' list a claim of which due notice had been given. This interpretation of section 53 involves reading "list of voters" where it occurs in that section as including "list of claimants"; but I do not think this is an undue extension of the meaning of the phrase. This interpretation makes the Act consistent, and is in accordance with the general scope of the Act. There is no reason why the law as regards counties and boroughs should be different in this respect. Mr. Cooke in his clear and able argument called our attention to the form (No. 25) of notice of objection to a claimant in a borough which is prescribed by 48 Vict. c. 17 (Schedule). That is the very form of notice of objection which was served on each of the persons whose right to the franchise is involved in the present case; and in it the terms "list of claimants," "list of persons entitled to vote," and "list of voters," are used indiscriminately to express the same thing. I think this shows that the phrase "list of voters" in section 53 is wide enough to include a "list of claimants." Once we adopt this interpretation it is plain that the section, like the preceding one which applies to counties, deals only with cases where the claimant's name has been omitted from the list of claimants, and thus the attempt to exclude boroughs from the principle of the decision in *Davies* v. *Hopkins* (1) breaks down.

As the claimants in this case must be held not to come within the scope of section 53, let us see what is the measure of the power and authority of the Revising Barrister in dealing with their claims. We find it stated in section 55 of the same Act, which says that the Revising Barrister may inquire into the nature of the qualification of any person whose name appears in "any list," language wide enough to include a "claimants' list." In cases of omission the claimants' list is, in my opinion, within section 53. In other cases it is within section 55; and if the name has been put in the list the case is within section 55. In the latter case the revising authority has no power to go behind the list, and he has no power under the section to engage in an investigation such as it is said he should have instituted here. Section 55 has been

(1) 3 C. B. (N. S.) 376; 27 L. J. (C. P.) 6.

Appeal. 1893. M'GROREY v. CHAMBERS.

re-enacted with some additions and alterations by section 27 of the Registration Act, 1885 (48 Vict. c. 17); but these alterations and additions are not material for the purposes of the present case.

Sir P. O'Brien, C.J.

Having regard to the line of authorities, commencing with *Davies* v. *Hopkins* (1), and to the powers conferred by the statutes on the Revising Barristers, I am clearly of opinion that when the Town Clerk has placed a claimant's name upon the list of claimants the Revising Barrister has no jurisdiction to inquire whether the claimant has duly made his claim, but that his duty is only to determine whether the claimant has proved his claim—whether he is possessed of the qualification in respect of which he claims.

The decision of Mr. Teeling is therefore right, so far as the point of jurisdiction is concerned, and must be affirmed. It is, therefore, not necessary to deal with the other point raised by the case, namely, whether the claimant must personally sign his claim.

PALLES, C. B.:—

The contention in the present case is, that although a claimant in a county who has been placed by the Clerk of the Peace on the claimants' list, need not prove the making or signing of his claim, a claimant in a borough placed by the Town Clerk on the claimants' list, is not in a similar position, and that if his claim be not duly signed by himself, his claim to vote cannot be admitted, although he duly proved his qualification.

This result is said to follow from section 24 of the Registration Act of 1850 (which makes the list of claimants part of the list of voters) being applicable to counties only. I agree that if, upon the true construction of the entire of the Act of 1850, the expression in section 53, "list of voters," in its application to boroughs, must be held not to include the list of claimants (which is, by section 34, directed to be prepared and published by the Town Clerk), that result would follow. Upon that construction a person who was

(1) 3 C. B. (N. S.) 376; 27 L. J. (C. P.) 6.

upon the list of claimants would be omitted from the list of voters, and consequently should prove that he gave due notice of his claim, a proof which is unnecessary in a case within section 55.

I am, however, of opinion that notwithstanding the inexplicable limitation to counties of section 24, the expression "list of voters" in section 53 must be held to include "list of claimants," even in its application to boroughs. I arrive at that conclusion for this reason:—The jurisdiction conferred on the Revising Barrister by section 53 is wholly different from that given by section 55. In cases within section 53 the Revising Barrister must (*Sale's Case* (1)), and in those within sect. 55, he cannot (*Davies* v. *Hopkins* (2)) inquire whether "due notice of the claim" has been given. It follows that any case cannot be within both sections 53 and 55. Were there such a case, the legislation in reference to it would be inconsistent with itself. Now the subject-matter of section 55 is clear, and includes the qualification of "every person . . . stated in *any* list." "*Any* list" includes the list of claimants under section 34, and therefore the qualification in reference to persons stated in this list is under section 55 and not under section 53.

If, then, the matter rested solely on the Act of 1850, the Revising Barrister would be right, unless we were prepared to overrule *Davies* v. *Hopkins* (2), followed, as it has been, by *Leonard* v. *Alloways* (3), and, as far as I am aware, always subsequently acted upon, except in the case of the lodger franchise, where, for reasons not material to be stated here, the principle of that decision was held to be inapplicable. It is said that *Sale's Case* (1) is in conflict with it; but that case was decided upon the ground that the applicant had been omitted from the "list of voters," an expression which, under section 6 of the English Act of 1843, included the list of claimants; and although it does appear that the name was included in some list or catalogue of claimants, that list must have been one different from that which corresponds with the list of claimants directed by section 34 of our Act. At p. 159 of the Report, Mr. Justice Grove says:—"It is a *datum* of this

(1) Colt. Reg. Cas. 152; 50 L. J. (C. P. D.) 113.

(2) 3 C. B. (N. S.) 276; 27 L. J. (C. P.) 6.

(3) 2 H. & C. 411; 48 L.J. (C.P.) 81.

Appeal. 1893.

M'Grokry v. Chambers.

Palles, C.B.

case that the applicant was a person omitted from the list of voters."

Then it is said that section 14 of 31 & 32 Vict. c. 49, and section 37 of 31 & 32 Vict. c. 112, distinguish the case from that which it would have been under the Act of 1850 alone.

The first of these sections enacts that "the notice of claim in a borough shall be signed by the person making the same." But this does no more than make the legislation in reference to boroughs identical with that which, at the time of the decision of *Davies* v. *Hopkins* (1) related to counties. Before this enactment, claimants in counties were, under section 22 of the Act of 1850, to send in notice, "having first signed the same." Section 34 of the same Act made no corresponding provision as to signature of claims in boroughs. The object of section 14 of 31 & 32 Vict. c. 49, was to remedy this anomaly.

Section 37 of the Act 31 & 32 Vict. c. 112, directs that the claimant shall not be registered, unless evidence be given "to prove *such claim*." But though I disapprove of the actual decision in *Meade* v. *Cooper* (2), I agree with the observation there made by Fitzgerald, B., in reference to the meaning of this section. "You assume," says the learned Baron, "that proof of the claim, and proof that the party rightly made his claim are the same thing. As I understand that section, if the clerk has received the claim, the party is exempt from proving that he rightly made the claim." I may add that the section presupposes that the party has made his claim. It commences, "any person *claiming*," and the proof of "such claim" to be given by a person assumed to be claiming must mean proof of his qualification.

The same observations apply to sect. 27 of the 48 Vict. c. 17. Form No. 25 in the schedule to that is that of a Notice of Objection to a person named in the list of claimants, and is, "I object to your name being retained on the list of persons *entitled* to vote," &c.; therefore the list of claimants must be within the description at the commencement of section 27 of "lists of parliamentary voters which it," the Court, "is appointed to revise."

(1) 3 C. B. (N. S.) 376; 27 L. J. (C. P.) 6. (2) Ir. R. 3 C. L. 125.

Upon the whole, I am of opinion that in a borough, when the name of the claimant is placed by the Town Clerk upon the list of claimants, the case is within section 55, and it is unnecessary to prove the making of the claim; but that, on the other hand, where the claim, although sent in, is not placed by the Town Clerk on the list of claimants, the case comes within section 53, and the claimant must prove not only his qualification, but also that the claim in respect of such qualification was duly made.

The decision of the Revising Barrister should be affirmed, and the names of the voters objected to should be retained.

FITZGIBBON, L.J.:—

I concur. I am glad to arrive at a conclusion which establishes that the effect of the legislation is the same in counties and in boroughs, and which does not disturb the practice which seems to have uniformly prevailed throughout Ireland.

I am satisfied that "proof of such claim" in 31 & 32 Vict. c. 112, sect. 37, means proof of the qualification claimed, and this qualification is, in my opinion, the only subject for investigation before the Revising Barrister, where the claim has been recognised as being in due form, and has been placed upon the proper list by the officials, who are charged with the preliminary duty of listing all those claims which appear *prima facie* to be well founded and regular. At the same time, it must be understood that these officials have the duty thrown upon them of seeing that they receive and list none but proper claims, and I am not to be taken to express any opinion that they are bound, or even at liberty, to accept or list any claim which has not been signed either by the claimant with his own hand or by his express authority.

I wish to observe that the ground of decision in the lodger cases, here and in England, seems to me to have an important bearing on the point reserved in this case; for if the Revising Barrister's duty was not thought to be confined to investigating the qualification, so much importance would not have been attached, in the lodger cases, to showing that the claim was part of

Appeal. 1893.

M'Grorey v. Chambers.

Fitz Gibbon, L.J.

the qualification, in order to hold that a lodger claimant must sign his claim, and be able to give evidence that he has done so.

Barry, L. J., concurred (1).

Solicitor for appellant: *J. E. O'Doherty.*
Solicitor for respondent: *Caldwell.*

G. Y. D.

Appeal. 1893.

Nov. 16. Dec. 6, 13.

RIDDALL *v.* QUIGLEY (2).

Poor-rate—Owner or tenant quitting without paying rate—Incoming owner or tenant paying portion of rate proportionate to period of his occupation—Resolution of Guardians—53 & 54 Vict. c. 30, s. 2—Parliamentary franchise.

The qualifying premises had been in the occupation of a tenant, who quitted them during the period for which the poor-rate was made without paying the poor-rate, or any portion thereof. The Board of Guardians passed no resolution in his relief. The incoming tenant, who succeeded him in May, 1892, paid, before July, 1893, a share of the poor rate proportionate to the period from the commencement of his occupation to the end of the current rating year and also the entire rate struck on the 29th November, 1892:—

Held (*diss.* Palles, C.B.), that the relief granted to the incoming tenant by sub-sect. 2 of sect. 2 of 53 & 54 Vict. c. 30, was not conditional on the Board of Guardians having taken the steps authorized by sub-sect. 1 of the same section, in case of an outgoing tenant who quitted the premises, leaving the rate unpaid, and that therefore the incoming tenant had paid all the rates by him payable up to the 1st January, 1893, and was entitled to the franchise:—

Per Palles, C.B. The incoming tenant remains liable to the entire rate payable in respect of the premises, except in cases where the Board of Guardians have exercised the power conferred on them by sub-sect. 1, and therefore the claimant had not paid all the rates by him payable up to the 1st January, 1893, and should not be admitted to the franchise.

(1) Compare the decision of the Queen's Bench Division in England: *Brown* v. *Tombs*; Fox's Registration Cases, 196.—Rep.

(2) Before Sir Peter O'Brien, C.J., Porter, M.R., Palles, C.B., and Fitz Gibbon and Barry, L.JJ.

Appeal. 1893. RIDDALL *v.* QUIGLEY.

APPEAL by the objector Thomas Riddall against the decision of Mr. Cuming, one of the Revising Barristers for the North Tyrone Division.

The facts appear from the case stated, which was as follows:—

"The name of Philip Quigley appeared on the supplemental list of rated occupiers for the Strabane Polling District of the said county, and was duly objected to by the appellant.

"It was proved he went into occupation of the qualifying premises in the month of May, 1892, and had paid on or before July 1st, 1893, a share of the poor-rates of said house proportionate to the period from the date of the commencement of his occupation to the end of the current dating year, and also the rates struck on November 29th, 1892.

"The outgoing tenant thereof still owed, and owes, his proportion of said first year's rates.

"I held that the said respondent had paid all the rates payable by him up to and including January 1st, 1893, out of these premises, under the recent Act."

The case concluded with a list of names of persons whose cases were identical with that of Philip Quigley, and stated that if the decision in his case was wrong, his and their names were to be struck off the register.

The appeal was argued on the assumption that the Board of Guardians had not passed any resolution determining that Quigley's predecessor was to be liable only to the portion of the poor-pate payable for the year commencing November 29, 1891, proportionate to the portion of that year during which he remained in occupation.

Ross, Q.C., for the appellant.

Healy and *M. J. Kenny*, for the respondent.

Cur. adv. vult.

Dec. 13.

SIR PETER O'BRIEN, C.J.:—

I fear I shall always be troubled by uncomfortable feelings regarding our decision in this case, because not merely does the opinion of the majority of the Court differ with that of the Lord

Appeal. 1893.

RIDDALL v. QUIGLEY.

Sir P. O'Brien, C.J.

Chief Baron, but it is also one in which I am able to concur only with great hesitation.

The case turns upon the true construction of a very ambiguous phrase in the 53 & 54 Vict. c. 30, s. 1. The question is, Is the determination of the Board of Guardians referred to in the first sub-section, a condition precedent to the operation of the second sub-section? To answer this question we must determine what is the meaning of the words "in any such case," which occur at the commencement of the latter sub-section. These words manifestly refer to an antecedent in the preceding sub-section. On reading the preceding sub-section we find that it gives power to the Board of Guardians to take a certain step in a certain event or case, which is thus described:—"When, after the passing of this Act, any poor-rate has been made for a particular period, and the owner or occupier of any rateable property, who is rated in respect thereof to such poor-rate, ceases to be owner or occupier of any such property before the end of such period, and has not paid the poor-rate"; and the section practically enacts that in such a case the Board of Guardians may, if they like, by resolution determine that a portion of the rate so struck is all that the outgoing owner or occupier is to pay. Thus the relief afforded to the outgoing owner or occupier depends on the action of the Board of Guardians. So much is plain on sub-section one. Do the ambiguous words "in any such case" refer to a case such as that in which power to take such action is given to the Board of Guardians? or do they refer only to cases where the Board of Guardians have taken the authorized step? Grammatically (it is conceded) they are capable of either meaning; but we must ascertain with which of these two meanings the Legislature has employed them. Two things are, I think, plain in sub-section two—(1) It fixes the amount to be paid by an incoming owner or occupier; (2) the mode in which the amount so to be paid is fixed is, as Lord Justice Barry said, during the argument, "automatic"; it works itself out; it does not depend on the resolution of the Board of Guardians. For the sub-section says that the amount for which the incomer is liable is to be arrived at by a calculation of the amount of the rate proportionate to the period of his ownership or occupation. The prescribed calculation is, therefore, wholly independent of the

relief which the Guardians may have accorded to the outgoing owner or occupier. It therefore appears that the Legislature contemplated the operation of the second sub-section in cases where the machinery prescribed in the first sub-section had not been put in motion. For this reason I do not think we should limit the words "in any such case" to denote merely cases where the Board of Guardians had thought fit to act upon the powers conferred on them by sub-section one. Grammatically these words are large enough to include all cases, where an incoming owner or occupier succeeds an outgoing owner or occupier, who, during the period for which a rate is made, has ceased to own or has quitted the premises, leaving the rate unpaid, and I have come to the conclusion that this is the meaning in which these words were employed by the Legislature. However, the considerations which have led me to this conclusion are so technical, and the section is so ambiguous, that it is only with grave doubt that I dissent from the view of the Lord Chief Baron, and concur in the judgment of the majority of the Court.

PORTER, M. R. :—

I am of the same opinion, and for virtually the same reasons. I am not aware what the blot was which this Act was meant to remove, and in this respect I have no clue to guide me in ascertaining its meaning; but, taking the question raised upon this section as a mere question of English grammar, it does not, I think, involve much difficulty. I do not think this is an Act for apportioning the rate. On the contrary, it provides for the payment of such parts of the rate as are proportionate to two different periods, though these two periods do not necessarily make up the whole period in respect of which the entire rate is payable; and thus the rate as a whole is not apportioned. The Act provides for the relief of an outgoing tenant from one portion of the rate, if the Guardians of the Poor take the prescribed action, and, under certain circumstances, it makes an incoming tenant liable for another portion of the rate if he comes into occupation during the period in respect of which the rate is made, and finds the rate still unpaid. The question is, what are the circumstances under which the Act

Appeal. 1893.

RIDDALL v. QUIGLEY.

Porter, M.R.

makes a portion of the rate only payable by the incoming tenant; but there is no question that the portions which the Act contemplates as payable by the outgoing and incoming tenants respectively need not make up the entire rate.

The first clause of section one enacts:—"When, after the passing of this Act, any poor-rate has been made for a particular period, and the owner or occupier of any rateable property, who is rated in respect thereof to such poor-rate, ceases to be owner or occupier of such property before the end of such period, and has not paid the poor-rate"—that is the *case* the occurrence of which is to lead to certain results—"it shall be lawful for the Board of Guardians of the Poor Law Union in which the property is situated to determine that such owner or occupier shall be liable to a portion only of the poor-rate payable for the whole of such period, proportionate to the portion of such period during which he remained owner or occupier, and thereupon he shall, notwithstanding anything in any of the Acts now in force for the relief of the destitute poor in Ireland, be liable to pay such portion only." The event, or "case," in which it shall be lawful for the Guardians to take action is that mentioned in the first part of this clause.

The second clause of this section commences with the words, "in any such case." I think these words most naturally refer to the same set of circumstances as those which lead to the action of the Board of Guardians mentioned in the first clause. I believe the Lord Chief Baron is of opinion that the words may refer to one of two antecedents—either to the "case" constituted by the state of affairs in which the first clause renders lawful the action of the Board of Guardians, or else to the "case" contemplated by the clause introduced by the word "thereupon," that is, after the Board of Guardians have taken the action rendered lawful by the section. Grammatically, I think that the second clause may be capable of either of these two meanings; and if it were in what in strictness was an apportionment Act, I should incline to adopt the latter as the true construction. However, as I have said, this is not an apportionment Act in the true sense; and, further, I cannot see from the methods of arriving at the amounts payable as prescribed in the two sub-sections any reason why the operation

of the second sub-section should be confined to cases where the Guardians have thought fit to exercise the power conferred on them by sub-section one. In this connexion, I would point out that by the terms of the first sub-section the action on the part of the Guardians is authorized only, and not enjoined, and that the relief granted by their taking action is limited to the owner or occupier who ceases to be owner or occupier. But in sub-section 2 the method prescribed for fixing the amount with which the newcomer is chargeable is wholly independent of any proceedings to be taken by the Guardians, and, so far as the method itself is concerned, is quite capable of being worked out, whether or not the outgoing occupier or owner has been relieved under sub-section 1. For the second sub-section says that the new owner or occupier is to be liable for a part of the entire rate proportionate to the period during which he is actually owner or occupier. "Such person shall pay a portion of the poor-rate payable for the whole of such period, proportionate to the portion of such period between his becoming such owner or occupier and the end of such period." In other words, the amount is to be determined by a simple calculation. Accordingly the action of the Board of Guardians is not necessary for determining the amount to be paid by the incoming owner or occupier, and the ascertainment by them of what the outgoing tenant is to pay would not give any help whatever in determining how much the incoming one is to pay. Therefore, from the prescribed methods of ascertaining the amounts to be paid by the outgoing and incoming owners or occupiers respectively, I am unable to see any reason why we should limit the operation of the second clause to cases where the Guardians have taken the action which they are anthorized to adopt by the first clause.

I come back, therefore, to what I venture to think is the more grammatical construction, namely, that the event upon which the Guardians are to be at liberty to act is the same event as that upon which the liability of the incoming owner or occupier to the prescribed portion only of the rate accrues, and this event is the ceasing to own or occupy by the outgoing owner or occupier leaving the rate unpaid during the period for which it is made.

In my opinion, therefore, the decision of the Revising Barrister was correct.

Appeal. 1893.

RIDDALL v. QUIGLEY.

PALLES, C. B. :—

I regret that I am unable to concur in the view of the majority of the Court; and as the decision is one that will not affect registry cases only, but will govern all the Courts in Ireland in determining the liability to poor-rate, it is right that I should express my reasons for the opinion I entertain.

The state of the law at the time of the passing of the statute was this: Under sect. 71 of 1 & 2 Vict. c. 56 there was an express statutable liability thrown upon the subsequent occupier, in the case of default of the person who was occupier at the time the rate was struck; and under that statute the liability extended to all the rates which had been struck during the six previous years. Then, by the 12 & 13 Vict. c. 104, s. 10, the period of the liability of the subsequent occupier was cut down to two years from the publishing of the rate. So that, as the law stood at the time of the passing of this Act, the subsequent occupier was, in substance, liable, in default of payment by the occupier when the rate was struck, to two years' rates.

The words of the statute now before us are: "When, after the passing of this Act, any poor-rate has been made for a particular period, and the owner or occupier of any rateable property, who is rated in respect thereof to such poor-rate, ceases to be the owner or occupier of such property before the end of such period, and has not paid the poor-rate, it shall be lawful for the Board of Guardians to determine that such owner or occupier shall be liable to a portion only of the poor-rate payable for the whole of such period, proportionate to the portion of such period during which he remained owner or occupier." Then the Act goes on :—"And *thereupon* he shall, notwithstanding anything in any of the Acts now in force for the relief of the destitute poor in Ireland, be liable to pay such portion only." It seems to me that "thereupon" in this sentence must mean "*in case the guardians shall so determine, then, upon such determination*, he shall be liable for such a portion only of the poor-rate." Well, then, I feel bound, for the purpose of construction of the other words of the section, to read "thereupon" in this sense, and I determine the case in the same way as if the statute contained, instead of "thereupon," the words,

"and in case the guardians shall so determine," then, upon such determination, there shall be a certain result.

Now, if that be the meaning of the statute, then there is not one case only, but two cases, referred to in the sub-section—viz.: 1, that of a person who has not paid the poor-rate ceasing to be owner or occupier; 2, that of his not only so ceasing, but of the Guardians determining he shall be liable to portion only. The question is, to which of those two cases do the words in the second sub-section, "in any such case," refer? One rule of construction is *ad proximum antecedens fiat relatio nisi impediatur sententia:* therefore the strict rule of construction would be to refer the word "such" to the last antecedent, that is, to the case of the exercise of, and not to that of the mere existence of, the power.

Now come to the words of the second sub-section. They are words which *prima facie* are suited to imposing a new liability, and not to extinguishing an old one. In every case in which the power given by the first sub-section is exercised, the liability of the first occupier—the principal—is expressly extinguished to everything except the proportionate part of the rate for the period of his occupation, and this express extinguishment carries with it in law the implied extinguishment to the same extent of the liability of the subsequent occupier, who was liable secondarily only. But further, the first sub-section extinguished the liability of the second occupier to the portion to which the first occupier remained liable. This I think appears from the direction that there shall not be distress or sale of the goods of anyone, except the first occupier. If then there were an intention, as there was, that the second occupier should pay anything, words imposing upon him a fresh liability were necessary; and to impose such new liability appears to me to be the true office and function of the words of the second sub-section. If this be their true meaning, they can apply only in a case in which the former liability was extinguished, *i.e.* in a case of the exercise of the power.

Appeal. 1893.

RIDDALL v. QUIGLEY.

FITZ GIBBON, L. J.:—

It is singular how differently matters of construction strike different minds. The Lord Chief Justice has doubts, and the Lord Chief Baron dissents from the majority of the Court. I must say that I should feel no doubt about the meaning of this Act of Parliament if the judgments of others did not show that it is not as clear as it appears to me.

The first clause of the section provides that if there is an outgoing occupier or owner who has not paid the rate—that is the "case" to which the clause refers—it shall be lawful for the guardians to determine that he shall be liable only to a part of the rate proportionate to the period during which he was in occupation, and "thereupon" he, the outgoing owner or occupier, becomes liable to "such portion only." The subject-matter of the clause is the outgoing man's liability, and the object and effect of the proceeding mentioned is to relieve him; this clause affects or mentions no one else, except to enact that the portion of the rate fixed under the clause shall not be leviable out of the goods of any other person than the outgoing owner or occupier. Therefore this first clause deals completely and independently with the liability of the outgoing man, in respect of the period of his occupation, in every "case" in which there is an outgoing occupier—whether he is succeeded by an incoming occupier or not. The man, the period, the portion of the rate, and the matter for the determination of the Guardians are distinct, and are all separately dealt with. But one "case" is stated, and the clause, in my opinion, deals completely with that case; the determination of the Guardians is not a second or implied case, but a thing to be done in the case which is expressly mentioned.

The second clause seems to me to deal, equally completely and equally independently, with the liability of an incoming person. The "case" is the same, namely—there having been an outgoing owner or occupier who did not pay the whole rate. The words "in any such case" mean, as before, if there is an outgoing owner or occupier who has not paid the rate; but this clause deals with the superadded event of there being also an incoming owner or occupier before the end of the period covered

by the rate. In that further event, the second clause provides that the incomer shall pay only a portion of the rate proportionate to the period of his occupation. If we try to read the words "if any other person, before the end of the period, &c., becomes the owner, &c.," into the first clause, the only place where it will grammatically fit is immediately after the words "and has not paid the poor-rate." There it fits perfectly, and, so reading it, "in such case" refer to the case of a change of occupation, without bringing in the words which empower the guardians to act, and there is then nothing to confine the operation of the second clause to cases where the guardians have already acted under the first clause.

There is nothing in the second clause which leads me to think that its operation is dependent on the mode in which the outgoing tenant may have been dealt with. The incoming owner or occupier is to pay an ascertainable sum to which his liability is unconditional. The Act is precise:—"Such person shall pay a portion of the poor-rate payable for the whole of such period proportionate to the portion of such period between his becoming such owner or occupier and the end of such period."

There is no need for the guardians to make any calculation, the amount payable is ascertained by the statute from the dates. The two periods—that in respect of which the amount payable by the outgoing owner or occupier is fixed by the guardians, and that in respect of which the liability of his successor is fixed by the statute—do not necessarily make up the whole period for which the rate was made, and they may not even be in the same period. There may be between them an intervening period, during which the premises may have been empty, and the calculation made in the case of the outgoer does not help to fix the amount to be paid by the newcomer. The newcomer, but for the Act, would be liable to pay the whole rate, and instead of imposing any new liability, the clause allows a smaller liability to take the place of a larger one. If the outgoer has paid anything, the guardians are so far profited, but the Act seems to have been chiefly intended for the relief of incomers, and I can see no reason to make their relief dependent on action being taken to calculate how much

Appeal. 1893.

RIDDALL v. QUIGLEY.

might or ought to be paid by some departed, and probably insolvent or indiscoverable occupier.

Sub-section (3) supplies a final argument to show that "the entire rate" is no longer recoverable in any case to which the Act applies, by enacting that "*the portions* payable under the provisions of this Act shall be collected, &c., by the same ways and means as *the entire poor-rate* might have been collected, &c., if this Act had not passed."

BARRY, L. J.:—

I must confess that my mind has fluctuated during and since the argument as to what is the true meaning of this sub-section. Even now, like the Lord Chief Justice, I have my doubts as to the correctness of our decision, and I need hardly say that these doubts are greatly enhanced by the fact that the Lord Chief Baron has come to a different conclusion. However, I think the policy of the Legislature was in ease of the incoming tenant. I think the intention was, where premises are left empty by a person who has absconded, leaving the rates unpaid, to relieve the property of an *incubus*, and to prevent a new tenant on coming in from being compelled to pay for a period during which either another tenant was in occupation or the premises were empty. It would be a curious thing if this relief were made to depend on whether the Board of Guardians took the trouble of passing a resolution fixing the amount chargeable on the man who was gone, when the amount payable by his successor is quite irrespective of the amount fixed by such resolution. On the whole, I agree with the majority of my colleagues.

Solicitor for the appellant: *William Wilson.*
Solicitor for the respondent: *Todd & O'Meara.*

G. Y. D.

TORISH, APPELLANT; HENDERSON, RESPONDENT (1).

Appeal.
1893.
Nov. 14.

Parliamentary franchise—Registration—Inhabitant householder—Temporary absence from house during repairs.

H.'s name appeared on the register of voters in a county, and was duly objected to. It was proved that he worked for an employer, by whom he was given, in addition to his wages, a house at a shilling a-week. During the qualifying period he had lived in two houses, living in one from the 2nd July to 22nd August, while there were alterations being effected in the other. He only paid rent for one house during this period. There was no succession claim made:—

Held (*diss.* Sir P. O'Brien, C.J.), that H. was not entitled to the franchise.

Held, per Sir P. O'Brien, C.J., that the rent was paid in respect of the house that was repaired alone, that there was evidence that H. had a tenancy in, and had inhabited, this house all through, and that he was not to be disqualified by his temporary absence during the repairs.

APPEAL by the objector against the decision of Mr. Cuming, one of the Revising Barristers for the North Tyrone Division.

The facts appear from the case stated, which was as follows:—

"At a Court held in said division of said county by me, one of the Revising Barristers appointed to revise the lists of voters of said division and county, the name of Robert Henderson appeared on the register of voters for Strabane Polling District of said division, and was duly objected to by appellant.

"Robert Henderson produced and examined. I work to Charles Stevenson; I get so much a-week and a house at one shilling a-week. I took the gable out of this house I live in, and extended it. In the meantime, during the alterations, I lived in another house of Mr. Stevenson's, working all the time to him. I was so living from July 2nd, 1893, to August 22nd. I did not pay for two houses during that time, only for one.

"I held that this was a temporary absence, and did not deprive him of his right to a vote, and that no succession claim was needed.

(1) Before SIR PETER O'BRIEN, C.J., PALLES, C.B., and FITZ GIBBON and BARRY, L.JJ.

Appeal. 1893.

TORISH v. HENDERSON.

"If I am wrong, his name is to be struck off said list of voters, otherwise to remain on."

Healy and *M. J. Kenny*, for the appellant :—

There should have been a succession claim: the qualification claimed is in respect of two dwelling-houses: *M'Goldrick* v. *Charlton* (1); *Dempsey* v. *O'Malley* (2); *Henderson* v. *Torish* (3).

Ross, Q.C., for the respondent :—

Henderson paid rent for only one house; he was tenant and in possession, constructively at least, of the repaired house all through the qualifying period; he took the gable out himself: *Short* v. *Woods* (4).

PALLES, C.B. :—

It must, I think, be taken that the occupation of the second house was under the contract. The claimant was entitled to but one house, and bound to pay but one rent. He paid but one rent. I think it follows that during the period in which he lived in the second house he had neither title to nor paid rent for the other. *Dempsey* v. *O'Malley* (2), is conclusive that the Revising Barrister is wrong, and his decision must be reversed.

FITZGIBBON, L.J. :—

The claimant had "a house" to live in all through; he inhabited two houses in succession, not two at the same time, and both were necessary to constitute his qualification. I agree in all respects with the Lord Chief Baron.

BARRY, L.J. :—

I concur.

SIR PETER O'BRIEN, C.J. :—

I regret that I cannot agree. I read this case as saying that Henderson paid rent for one house—the house that was repaired—and for no other. He was repairing it during his absence from it, and clearly had a tenancy in it, and so, in my opinion, the Re-

(1) Lawson, Notes, 1890-91, p. 7.
(2) *Ibid.* p. 8.
(3) Lawson, Notes, 1891-92, p. 6.
(4) *Ibid.*

vising Barrister thought. He evidently thought, as I do, that the second house was given to the claimant as a mere temporary accommodation, and that no rent was fixed in respect of it. I think that there is evidence that the claimant inhabited this house all through. It cannot be said in this case that the house was not in existence. I do not think the claimant is to be disqualified because he lived out of his house for a short time in order to have it repaired. A man is not to be deemed to lose his residence in Dublin because he is for a fortnight or three weeks living at Llandudno. In that case no succession claim could be made, and according to the argument at the bar the vote would be lost. The Revising Barrister says he held that the present was a case of temporary absence, and did not deprive the claimant of his right to vote, and, I think, there is evidence to sustain his decision (1).

Solicitors for the appellant: *Todd & O'Meara.*
Solicitor for the respondent: *W. Wilson.*

G. Y. D.

(1) A somewhat similar point arose in *Mulhern* v. *Buchanan and Miller*, the facts of which were thus set forth by the same Revising Barrister:—

"At a Court held in said division of said county by me, one of the Revising Barristers appointed to revise the list of voters of said division and county, the name of the appellant appeared in the Inhabitant Householders' List for the Strabane polling district of the said division and county, and was duly objected to by said second respondent.

"It was proved that appellant inhabited the first of the houses claimed out of up to the 22nd day of April, 1893, when it was burnt down. He then went to reside with some members of his family, who occupied the house next door, and so continued till the 31st day of May, 1893, when he took the second house out of which he claimed. The landlord of the burnt house meantime was rebuilding same for appellant, and the appellant, soon after the qualifying period returned to and still resides in same, and always intended so to return at the earliest opportunity. He paid no rent for the period he was out of occupation.

"I held that the interval during which he was out of the burnt house was so long that I could not decide that the appellant was entitled to a vote, and so struck his name out of said List.

"If I am wrong in so holding his name is to be reinstated; otherwise, to remain out.

Appeal.
1893.

TORISH
v.
HENDERSON.

Healy and *M. J. Kenny*, for the appellant.

Ross, Q.C., for the respondent.

SIR P. O'BRIEN, C.J.:—

We are all of opinion that the decision of the Revising Barrister is right. I repeat what I said in *Henderson* v. *Torish* (Lawson's Notes, 1891-2, p. 7):—"There cannot be occupation, constructively or otherwise, of what is not in *rerum natura*." The house had been burnt down, and therefore did not exist.

PALLES, C.B.:—

I decide this case entirely on its facts, and without laying down any principle whatever.

FITZ GIBBON, L.J.:—

I decline to refer to any other case. Here the landlord went into possession, and the tenant went out, and he paid no rent for the period while he was out of possession.

BARRY, L.J.:—

I was just going to say what the Lord Chief Baron has said. I decline to decide any future case on the facts of this.

Solicitors for the appellant: *Todd & O'Meara.*

Solicitor for the respondent: *W. Wilson.*

Q. B. Div.
1894.

Jan. 15, 16, 22.

THE QUEEN (AT THE PROSECUTION OF ROBERT E. BLAKENEY) *v.* THE JUSTICES OF THE COUNTY OF ROSCOMMON (1).

Criminal law—Justice of the Peace—Committal for trial—Certiorari.

The decision of Justices of the Peace, committing a defendant for trial, or admitting him to bail, under the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), sect. 15, cannot be brought up by *certiorari.*

ROBERT E. BLAKENEY appeared before the Justices at the Petty Sessions for the district of French Park in the county of Roscommon on the 22nd November, 1893, to answer a summons issued on the complaint of one Thomas Barrett. The summons charged that the defendant did on the 21st September, 1893, at

(1) Before SIR P. O'BRIEN, C.J., and O'BRIEN, HOLMES, and MADDEN, JJ.

Currocogil in the said district and county unlawfully and maliciously set fire to a dwelling-house, one Anne Barrett being at the time therein. Captain M'Ternan, R. M., and Mr. A. C. Newell, R. M., formed the Court. The evidence adduced in support of the charge was to the following effect:—The complainant Thomas Barrett had been tenant to Lord De Freyne of a holding of which a dwelling-house formed part. From this holding he was evicted, but took possession of it shortly afterwards; and on the 20th September, 1893, was again put out of possession by the sheriff. Immediately after the dispossession the house was pulled down and destroyed as a dwelling-house by the direction of the defendant, who was Lord De Freyne's agent. The same evening Barrett made a temporary shelter out of the remains of the thatch of the house, under which shelter he with his wife and children, of whom Anne Barrett was one, spent the night. On the next day, the 21st September, 1893, the defendant came to the place and set fire to this temporary shelter. It was deposed that the child Anne Barrett was within the temporary shelter at the time it was set fire to, though it was not alleged that the defendant was aware of this fact. Evidence was given on behalf of the defendant that the place had been searched by the defendant before setting fire to the thatch, and that it was impossible that any person could have been under the shelter at the time.

Mr. Fetherstonhaugh, counsel for the defendant, contended that the house formerly occupied by Barrett having been utterly destroyed as a dwelling-house, there was no offence within the section of the statute under which the summons was brought (24 & 25 Vict. c. 97, s. 2), as the mere fact that persons sought shelter under the ruins did not constitute such ruins a dwelling-house; and that as it was proved to be in the possession of Lord De Freyne, and as the defendant set fire to it as his agent, there was no offence unless an intent to injure or defraud was proved. The magistrates did not require to hear argument on this point, and retired for consultation; and on their return Captain M'Ternan, after some observations, stated that they would return Mr. Blakeney for trial, and would take his own bail. He was then admitted to bail. The only order entered in the Petty Sessions Book was as follows:—

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF ROSCOMMON.

"Depositions returned to the next Assizes for the County of Roscommon."

On the 28th November, 1893, a conditional order was obtained from this Division for a *certiorari* to remove for the purpose of being quashed "all and singular orders and adjudications of the justices of the peace in and for the county of Roscommon made at the French Park Petty Sessions on the 22nd November, 1893, on the hearing of the summons or complaint" [here follow the words of the summons mentioned above] "whereby or whereunder the said Robert E. Blakeney was committed or returned for trial to take his trial . . . . and all and singular informations, examinations, depositions, and the recognizances taken or made before the said justices touching the said supposed charges."

The grounds stated in the conditional order were that the order was made without and in excess of jurisdiction, inasmuch as there was no evidence that the place set fire to was a dwelling-house; that the magistrates did not decide it was a dwelling-house; that they declined to consider and decide that it was a dwelling-house; that the premises set fire to being the property of and in the possession of Lord De Freyne, and set fire to by the defendant as his agent, and the justices being of opinion that no intent to injure or defraud was proved should have decided that there was no offence under the section.

The conditional order was obtained on an affidavit by H. B. St. George, solicitor for the defendant; and cause was shown by an affidavit of Captain M'Ternan, R. M. The course of the proceedings at the Petty Sessions, as disclosed by the affidavits, are fully stated in the judgment of the Lord Chief Justice, *infra*, page 163.

Campbell, Q.C. (with whom was *Fetherstonhaugh*), moved to make absolute the conditional order:—

Certiorari will lie to remove the proceedings of magistrates in the nature of a judicial act for the purpose of quashing them: Hawkins' Pleas of the Crown, B. 2, Ch. 27, ss. 22 and 23, where examinations taken by justices in pursuance of 2 & 3 Ph. & M. c. 10, are expressly stated to be removeable by *certiorari*. In *Reg* v.

Justices of the West Riding of Yorkshire (1), an order of magistrates to estreat recognisances was brought up by *certiorari*.

The frame of section 15 of the Petty Sessions Act (14 & 15 Vict. c. 93) shows that the magistrates are bound to act in a judicial manner upon legal evidence.

The committal for trial is a judicial act: *Re Guerin* (2). This case also decides that the Court can review the decision of Justices on a question of fact cardinal to the jurisdiction, but collateral to the subject of inquiry.

Mandamus and *certiorari* are correlative. Now, *mandamus* lies to magistrates to return depositions: *Ryan* v. *Goddard* (3); *The Queen* v. *Adamson* (4); *Lawrenson* v. *Hill* (5).

Next, the evidence shows that the structure set fire to was not a dwelling-house at all. The structure set fire to was a temporary shelter only. Permanency is the test as to whether a structure is a dwelling-house within the meaning of the statute or not; and in any case, as the Justices did not decide that the structure was a dwelling-house, they could not decide that a *prima facie* case was shown; in fact it was not proved that a criminal offence had been committed at all.

The Attorney-General (with whom was *C. Mac Dermot*), for the Justices:—

No case has been cited in which a *certiorari* has been issued to bring up a decision of magistrates committing a person for trial. The act of the Justices is a ministerial, not a judicial act. Even if it be a judicial act, it is within the jurisdiction of the magistrates, and this Court will not interfere with it on the ground that the evidence if examined into would not support the decision: *The Queen* v. *John Sullivan* (6). Suppose that they come to the conclusion that a *prima facie* case has been established, their duties from that point forward are purely ministerial, and defined by the statute. They must either commit the defendant to prison, or admit him to bail. These latter acts are the result of the judicial

(1) 7 A. & E. 583.
(2) 16 Cox C. C. 596.
(3) Judgments of Superior Courts, Ireland, 262; 15 Ir. L. T. R. 103.
(4) 1 Q. B. Div. 201.
(5) 10 Ir. C. L. R. 183.
(6) 22 L. R. Ir. 504.

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF ROSCOMMON.

act, which merely consists in forming an opinion that a *prima facie* case exists. The statute does not require them to make up any order, and in fact the Petty Sessions book shows that no order was made except that the depositions be sent forward. They only put the case in train to go before another Court, and no order is required. There is nothing to be touched by *certiorari*, which does not lie for ministerial acts: Short and Mellor's Practice of the Crown Office, p. 115; *R.* v. *Lediard* (1). In *Ryan* v. *Goddard* (2), the application was for a *mandamus*, which lies to compel performance of a ministerial, as well as a judicial act: *Ex parte Taunton* (3). In *The Queen* v. *Adamson* (4) the application was for a *mandamus* to compel magistrates to issue a summons. The general rule is that *certiorari* lies for a defect or informality apparent on the face of the order, or for want of jurisdiction, but not on the merits: Short and Mellor's Practice of the Crown Office, p. 116; *Reg.* v. *Bolton* (5). Again, the question whether the structure fired is or is not a dwelling-house, is not collateral; it is the very gist and substance of the offence charged, as in arson at common law: 3 Coke's Inst. p. 67; 2 East's Pleas of the Crown, p. 1020; *The Queen* v. *Bradlaugh* (6). The Court cannot look at the depositions to see if the evidence supports the decision of the Justices: *The Queen* v. *John Sullivan* (7).

Fetherstonhaugh, in reply:—

The order is bad on the face of it. For the statute requires the Justices, after they have formed the opinion that a *prima facie* case has been shown, either to commit the defendant, or to admit him to bail. Here there is nothing to show that either of these was done. The depositions can be used to show that the order was made without jurisdiction: *The Queen* v. *John Sullivan* (7) is distinguishable. This case is more like the *Londonderry Case* (8).

(1) Sayer's Rep. 6.
(2) Judgments of Superior Courts, Ireland, 262; 15 Ir. L. T. R. 103.
(3) 1 Dow. Pr. Cas. 54.
(4) 1 Q. B. Div. 201.
(5) 1 Q. B. 66; 19 L. J. M. C. 49.
(6) 3 Q. B. Div. 509.
(7) 22 L. R. Ir. 504.
(8) *The Queen* (*Robert Orr and Others*) v. *The Justices of Londonderry*, 28 L. R. Ir. 440.

[MADDEN, J: In the *Londonderry Case* (1) it was impossible to know whether the magistrates had jurisdiction or not without reading the evidence.]

Here the order on the book incorporates the depositions by reference—they have become part of the order itself. These proceedings before magistrates are analogous to a coroner's inquisition, and in the latter case the depositions can be legitimately used to show that the verdict was perverse, founded on no evidence at all: *In re the Ardee Inquisition* (2); *In re James Casey and Others* (3). The decision in this case was without evidence and perverse.

Cur. adv. vult.

SIR PETER O'BRIEN, C. J.:—

Jan. 22.

On the 28th of last November a conditional order for a writ of *certiorari* was obtained by Mr. Campbell on behalf of Mr. Blakeney, in order to remove into this Court for the purpose of being quashed what was described in the conditional order as "all and singular orders and adjudications of the Justices of the Peace in and for the County of Roscommon, made at French Park Petty Sessions on the 22nd November, 1893, on the hearing of the summons or complaint designated 'Thomas Barrett, complainant; R. E. Blakeney, defendant. That the defendant did unlawfully and maliciously set fire to a dwelling-house, Anne Barrett being at the time therein,' whereby or whereunder the said Robert E. Blakeney was committed or returned to take his trial on the said charge."

Now this was the conditional order which was granted by this Court, and it appears by its recitals that the prosecution against Mr. Blakeney was at the suit of a private individual named Thomas Barrett, and the charge in the summons or complaint was founded on the 2nd sect. of the 24 & 25 Vict. c. 97, which provides that "whosoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony." There is no doubt that the summons was well and technically drawn. It set forth an offence in the words of the statute. When granting the conditional order we directed

(1) 28 L. R. Ir. 440. (2) 25 Ir. L. T. R. 11. (3) 3 Ir. C. L. R. 22.

Q. B. Div. 1894. THE QUEEN v. JUSTICES OF ROSCOMMON Sir P. O'Brien, C.J.

that it should be served amongst others upon the Chief Crown Solicitor. This was done, and the Attorney-General has shown cause. We granted the conditional order so that, as I stated when delivering the judgment of the Court, the questions raised might be fully considered. The case has been argued at considerable length, and judgment was reserved until to-day.

Now, what was the charge against Mr. Blakeney? What were the facts? What was the action of the magistrates? What is the impeachment of that action? Is that impeachment sustainable in this Court when the action of the magistrates is sought to be questioned by writ of *certiorari*? I have already stated what the offence charged against Mr. Blakeney was, "that he unlawfully and maliciously set fire to a dwelling-house, Anne Barrett being at the time therein," a well-known and very grave statutable offence, for which the maximum punishment is penal servitude for life.

Now what were the facts—or perhaps I should say alleged facts? As to some matters there is no substantial doubt; as to others there is an acute controversy. It is requisite to deal with them at some length in deciding the case. We must ascertain the controversy in point of fact in order to understand the impeachment of the magistrate's action in point of law. From the affidavits and documents referred to at the bar by counsel it appears that a man named Thomas Barrett, the complainant in the summons, and who was father of the Anne Barrett referred to, owed Lord de Freyne, whose agent Mr. Blakeney was, several years' rent. Lord de Freyne obtained, in 1888, a decree against Barrett for non-payment of rent. This appears to have been executed. Barrett was permitted to remain as caretaker in house and lands until February, 1892, when, not having redeemed the land, or made any payment of rent, he was dispossessed by the sheriff. It appears that he immediately retook possession, and continued in possession without any payment of rent until the 20th September, 1893, when he was again put out. On that day Mr. Blakeney came, attended by ten men, put out Barrett's goods and furniture, and, as was alleged on behalf of Mr. Blakeney, destroyed the house by throwing down the walls, so that the roof fell in. Next day, that is on the 21st September,

he came, and, as was stated, set fire to the ruins. It was alleged that Anne Barrett was then in them, and that she was to a certain extent burned by the fire. It was not alleged or in any way pretended that Mr. Blakeney knew that Annie Barrett was in the ruins, if indeed she was there. The description given by Barrett, the prosecutor, of the so-called "dwelling-house" was as follows:—He stated before the magistrates that he had been away on the day of the 20th of September, and that when he returned in the evening he found his house had been tumbled down; some of the furniture was out and some inside the house; that some of the rafters were sticking through the thatch; one gable was down, and a portion of the other, to within a few feet of the ground. He stated that on the evening of the 20th he fitted up a place in the ruins for himself, his wife, and children; that they pulled a few sticks out and put them across to make a temporary shelter, and he put some of the old thatch upon the top; that he did not know how long he might have to stop in it; that some of the family stopped under the shelter, and some in holes, the best way they could; that he pulled sticks out of his way to get in under the thatch. He also stated that the child, Annie Barrett, was in the so-called dwelling-house when Mr. Blakeney set fire to it; that he saw the child brought out of the "house" by its mother when the so-called dwelling-house was, as he said, blazing. Barrett's wife was examined, and gave practically the same description of the condition of the so-called dwelling-house. Some other witnesses were examined, I believe, on the part of the prosecution, but the two principal witnesses were Barrett and his wife.

Now, on the part of Mr. Blakeney, witnesses were examined, and one named Stephenson deposed to the complete demolition of the house, and stated that before it was set fire to on the 21st September he went into every inch of the ruins of the house; that Mr. Blakeney and Thomas Cox were with him; that they searched the ruins all through; that there was no place for any person to be without their seeing them; that no person was inside the place; that a dog could not be there without their seeing him.

Now, this was the substance of the evidence, so far at least as it is material to state it, in order to understand the grounds upon

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF ROSCOMMON.

Sir P. O'Brien, C.J.

which the action of the magistrates has been challenged. When the evidence concluded, Mr. Fetherstonhaugh, a distinguished member of the junior bar, who conducted the defence of Mr. Blakeney, submitted, amongst other points, to the presiding magistrates, Messrs. M'Ternan and Newell, that the house formerly occupied by Thomas Barrett, having been on the 20th September utterly destroyed as a dwelling-house, there was no offence within the section of the Act of Parliament, as the mere fact that persons sought shelter amongst the ruins of the thatch did not constitute such ruins a dwelling-house. An elaborate argument appears to have been addressed to the magistrates by Mr. Fetherstonhaugh, who came down to Roscommon fortified with legal authorities. The magistrates retired to their room, and after a long deliberation Mr. Blakeney was returned for trial.

Now, the action of the magistrates in returning Mr. Blakeney for trial is impeached—is alleged to have been without and in excess of jurisdiction on two main grounds:—1st, that there was no evidence that the place set fire to was a dwelling-house; 2ndly, that they did not decide, that in fact they declined to decide, it was a dwelling-house. It is unnecessary to refer to the question that was raised with reference to the statement made by the magistrates during the argument, that there clearly was no intent to injure or defraud proved. This was disposed of during the argument. I shall deal in the first place with the second ground of impeachment, namely, that the magistrates did not decide, and declined to decide, that the place set fire to was a dwelling-house. All controversy on this point is, in my opinion, closed by the circumstance that Mr. Blakeney was, as a matter of fact, returned for trial by the magistrates. The only offence charged in summons or depositions was the offence of unlawfully and maliciously setting fire to dwelling-house, Anne Barrett being at the time therein. Depositions were returned to the next assizes for the county of Roscommon, according to the entry in the Petty Sessions book, and this implied that the magistrates had decided that a *prima facie* case had been established, in their opinion, against Mr. Blakeney, in reference to the offence charged, and it was of the very essence of this offence that the place set fire to was a dwelling-house. They must be taken so to have determined;

and we cannot permit reference to the use of ambiguous language in Court, or an unseemly controversy as to what took place in the magistrates' private room, to derogate from the effect of what was intended by the magistrates as the official entry of what they had done. They did return Mr. Blakeney for trial, and they must be conclusively assumed to have returned him for trial for the only offence with which he was charged before them. Not that I think the Petty Sessions book or the entry therein was, for reasons I will hereafter explain, a record, or a recording of their action in the strict legal sense in which these terms are respectively understood.

I now turn to the first and indeed the principal point, on which the action of the magistrates was challenged, namely, that there was no evidence that the place set fire to was a dwelling-house. Was there then any such evidence? If not, can what has been done by the magistrates be successfully impeached in this Court by means of the prerogative writ of *certiorari*? That there was not evidence to sustain the offence charged against Mr. Blakeney, I think there can be no reasonable doubt. It was, as I have already said, of the essence of the offence, a part of the *corpus delicti*, that the place set fire should be a "dwelling-house," and the allegation that a mere temporary shelter made out of the *debris* of the thatch of a demolished house was a dwelling-house is a proposition in my opinion wholly unwarranted by law, and without any sanction from common sense; it is equally opposed to law and common sense, and ought to be condemned at once by lawyer and layman; but though the evidence failed to sustain the charge made against Mr. Blakeney, can we review the action of the magistrates in this proceeding by *certiorari*? I am clear that we cannot. In the first place there is no precedent for so doing. The law has been described as

> "That codeless myriad of precedent;
> That wilderness of single instances";

but with all its precedents, and all its instances, there is no precedent to warrant this application, no single instance in which this writ under such circumstances as we have here was granted. The fact that there is no precedent for the issue of the writ of

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF ROSCOMMON.

Sir P. O'Brien, C.J.

certiorari under the circumstances is a strong ground for showing that procedure by the writ of *certiorari* is inapplicable, and the more so as cases must have arisen from time to time calling for the exercise by this Court of the jurisdiction to grant such a writ if such a jurisdiction existed in such cases. But whilst we are wholly without precedent to warrant us in granting the writ, we are not equally without precedent to warrant us in refusing to grant it. My brother O'Brien has informed us that he recollected that a similar application was made, some years ago, to this Court. We directed a search to be made, and the officer of the Court has discovered the case referred to by my learned brother, and has furnished me with a note of it. It appears that on the 28th November, 1887, in the case of *The Queen* v. *Cummins* (1), Mr. Counsel moved for a *certiorari* to bring up the committal of the defendant, who was committed on a charge of larceny. The ground on which the *certiorari* was applied for was that the Justice who made the order committing the defendant, took no information justifying his committal. The Court made no rule. This is the entry on the Crown book. Now, of course, the mere entry in the book would not assist us here because the Court might for anything that appeared in the book have been of opinion that the evidence did warrant the committal and have refused the *certiorari* on that ground; but my brother O'Brien, who was a member of the Court on that occasion, tells me that the ground of the refusal was that the application was wholly without precedent and that the granting of it would, in the opinion of the Court, have been calculated to revolutionize the administration of the criminal law. The Court, when this ruling was made, consisted of the then Chief Justice, my brother O'Brien, and my brother Johnson. So much then for precedent. Let us see how the case stands on principle. The principle of the decision of *The Queen* v. *John Sullivan* (2), decided in this Court on the 28th January, 1888, seems to preclude our entertaining this application. I was not a party to the decision in that case, but of course I am bound by its authority. The then Lord Chief Justice, now Lord Morris, in giving the judgment of the Court in that case, which was one in which a writ of

(1) Unreported. (2) 22 L. R. Ir. 504.

certiorari was moved for in order to remove an order of conviction, shortly stated the principle upon which it rested, that where a charge has been well laid before a magistrate, and it is an offence within his jurisdiction, this Court will not inquire into the grounds of the decision. Applying this principle to this case, what do we find? The charge was clearly well laid. The offence, so far as related to the investigation before the magistrates, was clearly within their jurisdiction; and if we are precluded from looking at the evidence, as *The Queen* v. *John Sullivan* (1) decided that we are, we must do, as was done in that case, namely, refuse the application for the writ of *certiorari*. Indeed in this case there seems to be in reason a stronger warrant for not examining the evidence than existed in *The Queen* v. *John Sullivan* (1). That was a case of conviction attended by punishment. This is a case of merely sending on for trial before another tribunal—rather, I should say, for further investigation before the Grand Jury, and should they find a bill, for trial before a Petty Jury.

As to the allegation that the question of the existence of a dwelling-house is a mere preliminary inquiry and collateral to the merits, and can therefore be examined into by reference to the depositions, this is wholly without foundation. It is, as I have already said, essential to show that the place set fire to was a dwelling-house—this is part of the *corpus delicti*—directly of the very definition and essence of the crime, and therefore an investigation with reference to it is not a mere preliminary inquiry collateral to the merits. However, I much prefer to rest my decision on another ground—on a ground which, in my opinion, is much broader and stronger than any the consideration of the case of *The Queen* v. *John Sullivan* (1) can supply, namely, that there is an absolute discretion vested by the statute—the Petty Sessions Act—in the magistrates to determine whether the evidence before them is sufficient to put an accused person on his trial, and that once they have exercised that discretion the Court cannot control, or review it by writ of *certiorari*. The 14th sect. of the Petty Sessions Act, 14 & 15 Vict. c. 93, provides for the manner in which evidence shall be taken in the case of indictable offences,

(1) 22 L. R. Ir. 504.

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF ROSCOMMON.

Sir P. O'Brien, C.J.

namely, by depositions subject to the provisions of the section. The evidence being taken, the 15th sect. provides for the manner in which the accused person, to use the language of the section, shall be "disposed of"—that is to say in this way— if the Justice or Justices present *shall be of opinion* that the evidence is not sufficient to put such accused person on his trial, he or they shall forthwith order such accused person, if in custody, to be discharged as to the information then under inquiry; but, if in the *opinion* of such Justice or Justices such evidence is sufficient to put such person on his trial; or if such evidence raises a strong or probable presumption of guilt, then such Justice or Justices shall either by warrant commit him to gaol, to be there kept until his trial for said offence, or shall admit him to bail in the manner thereinafter provided *according as he or they shall see fit.* Now it will be seen that the action of the magistrates is to depend upon *their opinion*, as to the sufficiency of the evidence, and they are to determine between committal and bail, as *they shall see fit.* In my judgment the language of the section confers upon the magistrates a discretion to determine whether what has been deposed to, and is embodied in the deposition, is sufficient to put an accused person on his trial for the offence with which he is charged. This discretion being vested in the magistrates, and it having been exercised, as in the present case, how stands the law? Can we control or review the exercise of their discretion by the magistrates? In my opinion, it is clear upon the authorities, that we cannot by *mandamus* compel magistrates to return an accused person for trial, once in the exercise of their discretion they have determined he shall be discharged, and it is equally clear that we cannot in any proceeding by *certiorari* quash a decision of the magistrates, which results from the exercise of a discretion vested in them by law.

Now, some observations made in *Ryan* v. *Goddard* (1) by Lord Fitzgerald, when a member of this Court, took me by surprise. He is reported to have said, "In the execution of the authority which we possess to control the proceedings of inferior tribunals we have, in my opinion, clear jurisdiction in a

(1) Reports of Judgments of Superior Courts, Ireland, p. 262; 15 Ir. L. T. R. 103.

case in which Justices at Petty Sessions have refused to receive informations, and dismissed the charge, to order them to receive the informations and commit the parties for trial." No one entertains a greater respect than I do for the opinion of that eminent Judge, but I think the opinion here was expressed inadvertently. It is a well settled law that we can by *mandamus* only compel magistrates to entertain a case within their jurisdiction, and that we cannot compel them to any particular decision. Indeed, as has been pointed out by the Court, there is no sanction for the proposition laid down by Lord Fitzgerald to be found in the judgments of Mr. Justice O'Brien and Mr. Justice Barry, who were parties to the decision in *Ryan* v. *Goddard* (1). On the contrary, Mr. Justice O'Brien referred to the statement made by Lord Tenterden in *The King* v. *The Justices of Middlesex* (2), "that there was not an instance that could be cited where the Court granted a *mandamus* to Justices to compel them to come to any particular conclusion." I might refer to a case of *The Queen* v. *Justices of the King's County* (3) decided in this Court. It was a case argued by very eminent counsel, by Mr. Macdonogh on one side and the then Solicitor-General on the other. In that case, which was under the Licensing Acts, a certificate of good character had been applied for by a man who sought a license to sell spirits and porter. The magistrates had refused the certificate, and it was sought by application to the Queen's Bench to compel them to grant it. The Court was so clearly of opinion that they could not interfere with the discretion of the magistrates that the case was disposed of by interlocutory observations from the judges during the argument. Lefroy, C.J., said, "Have not the magistrates exercised their discretion? If they act corruptly the party aggrieved may apply for a criminal information against them." Mr. Justice O'Brien said, "Does not the Act of Parliament leave it in the discretion of the magistrates to form an opinion as to the character of the person seeking the certificate?" And he added that Mr. Levinge's book referred to a case of *Clee* v. *Osborne* (4) which decided the very point that when magistrates have not

(1) Reports of Judgments of Superior Courts, Ireland, p. 262; 15 Ir. L. T. Rep. 503.
(2) 4 B. & Ald. 298.
(3) 8 Ir. C. L. R. 50.
(4) 21 L. J. (M. C.) 112.

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF ROSCOMMON.

Sir P. O'Brien, C.J.

refused to act, but have done what they believed to be their duty, this Court would not interfere; and Crampton, J., added that there was no jurisdiction except in cases where the magistrates refused to act officially. This very doctrine was acted upon recently in England in a case where a man sought to obtain a summons against his Royal Highness the Duke of Cambridge for an alleged assault. The magistrate had refused to issue the summons, and the Court—the Queen's Bench Division in England—it appearing that the magistrate had entertained the application for a summons, and in the exercise of his discretion refused to grant it, declined to interfere, on the ground that it had no jurisdiction to do so, the magistrate having exercised his discretion. There can be no question as to the principle of law. It is clear that this Court, when a discretion is vested in the magistrates, and that discretion has been exercised, has no jurisdiction to interfere either by *mandamus* or *certiorari*. This, I think, is a conclusive reason for refusing the present application. It is said, however, that sending an accused person for trial is a judicial act, and that the validity of a judicial act can be impeached by *certiorari*. No doubt, a decision that a *prima facie* case is made out to send an accused person for trial involves a judicial act: it implies a determination resulting from the weighing of evidence; and this, in my opinion, is a judicial act; so the Attorney-General admitted, and so Mr. Justice Wills laid down in *Re Guerin* (1); but it is a judicial act involving the exercise of their discretion by the magistrates—the manner of the exercise of which we cannot control—and, in my opinion, it is, as was put by the Attorney-General an unrecorded judicial act. In my judgment it was not only an unrecorded judicial act, but it was a decision not intended by the statute to be recorded. The Petty Sessions Act, while it does not provide for the recording of the judicial determination of the magistrates that an accused person shall be sent for trial, in the most careful way provides in the 21st section an elaborate machinery for recording convictions and orders made by the magistrates in the exercise of their summary jurisdiction.

The issuing of a warrant of a committal for detention until

(2) 16 Cox C. C. 591.

trial is not, in my opinion, a judicial act. The form of the warrant given in the appendix to the statute does not contemplate the recital in it of any judicial determination that the accused should be returned for trial. The issue of the warrant seems to me to be a ministerial act, though it is preceded by what is tantamount to a judicial decision. The judicial decision arrived at by the magistrates, when they determine that an accused person should be sent to trial, is not within that class of decisions that can be challenged by writ of *certiorari*. It is not recorded, even in an untechnical sense—it is not intended to be recorded. The fact that the Legislature did not provide for the recording in some shape of the judicial decision of the magistrates, when they determined that a person is to be sent on for trial, shows that is a matter within their discretion not removable by *certiorari*. There is no legal entry made pursuant to statute upon which *certiorari* is to attach and remove. The granting of the writ now sought for would, in my opinion, be fraught with inconvenience and mischief. It would cause great delay and embarrassment in the administration of the law. The granting of the writ under the circumstances would, as I have stated, be without precedent. On the contrary, whatever precedent exists is against granting it. The application derives no sanction from principle, and in this class of case, that is to say, a case where the magistrates return an accused person for trial—considerations of hardship are far more than counterbalanced by considerations of convenience. The decision of the magistrates is not in such cases final. The Grand Jury may find no bill. The Attorney-General, if a bill is found, may interpose in the exercise of his prerogative, and enter a *nolle prosequi*. The Judge may direct the Petty Jury that there is no evidence to sustain the charge, and if it be a case that cannot, though of a meagre character, be withdrawn from a jury, the jury, if it be a just jury—and the law assumes that it will be just—may acquit. And if they convict in case there is any doubt about the legality of the evidence, the Judge may reserve the consideration of it for the Court for Crown Cases Reserved. On these grounds I think the application should be refused.

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF ROSCOMMON

O'Brien, J.

O'BRIEN, J.:—

This is a motion asking the Court to do what no Court in England or Ireland has done for centuries. I begin with that. For the statute of Philip and Mary, that first required informations to be taken in writing, was passed more than three centuries ago, and with all the temptation to stop, or delay, or discredit criminal trials, the books have been searched for a single instance of such a use of *certiorari*, with the result that there is a long night of legal darkness, during which no glimmer of this new light has ever appeared. That is, to my mind, the strongest possible argument against the existence of the right now in question. For the power of *certiorari* must be determined either by actual use or by the existence of some clear principle out of which it flows, and it must have flowed all this time the same way, and the fact that it did not so flow causes us at once to look for the obstacle. The obstacle, in my opinion, is no other than this, that the general power of superintendence belonging to the Queen's Bench over inferior tribunals was never considered to extend to any but tribunals in the exercise of definite, exclusive, and final judgment, and that the limitation of the principle, which excludes the present case, is to be found in the very terms of the proposition itself—magistrates returning informations are not tribunals in the sense of the rule. They do not deliver any judgment by which the party is immediately affected, and for which the control of this Court would require to be established. No doubt an accused person is put to great inconvenience by being exposed to the danger, expense, or ignominy of a trial. So is a person who has a civil action brought against him. The result of the trial is the redress which the law provides. There are other means besides the interference of this Court, which the law looks to in the case of persons returned for trial, to prevent any ultimate wrong. Between the accused and any harm that may come to them stand the Grand Jury, the Judge, and the common jury, besides the power of the Attorney-General, which may be used either wholly to stop, or not to assist unjust and oppressive prosecutions. The question, in my mind, is not at all as to the distinction between judicial and ministerial acts, but as to the kind of judicial acts in respect of which the restraint by

certiorari is instituted. Even if an order were expressly required to be made, that could not qualify or alter the purpose and object of the act of the Justices, which is simply committing the party for trial, and in the origin of the office was done by Justices without any form whatever. And it is hardly possible to conceive any explanation of such an entire blank of authority for such a proceeding as the present, except that the object of such a use of *certiorari* is not to control or correct an inferior tribunal, but to stop the *transitus* of the case to another tribunal. Considering that the law of *certiorari* is determined by instances of actual use, to which no other invariable principle is applicable, the want of all suggestion of such a use of the remedy occurring in the whole history of the law—for the case of orders that are subject to appeal or indictments are no real exception—would be, to my mind, an absolutely sufficient ground for holding that such an application as the present cannot be maintained.

But perhaps the point is not altogether destitute of negative authority; for that appears to be the only construction of the case in Ventris, p. 63, where, upon the direct interference of the King on behalf of two Frenchmen committed for trial, and even after an interview with the King himself, the Judges considered they could not grant a *certiorari* until indictment found, because they said, "that would be to discharge the King's justice," which means illegally to arrest the course of the law. However, it was suggested, though no precedent could be cited for such a *certiorari* we could arrive at it by a kind of development. But where is the germ in the law from which such development can come? Mr. Fetherstonhaugh's creation, in the legal progress of species, is a giant, without ever having been an infant. For it is quite extraordinary that an utter want of encouragement for such an idea is the result of a search into the rudiments of the common law. *The Queen* v. *Bolton* (1), which was a case of summary conviction, as well as *The Queen* v. *Sullivan* (2), if this case were to be dealt with on the same principle, would supply an answer to the argument, in the resolution of the Judges not to allow any question whether the Justices were right or wrong in the conclusion they drew from

(1) 1 Q. B. 66. (2) 22 L. R. Ir. 504.

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF ROSCOMMON.

O'Brien, J.

the evidence. The case of *The Queen* v. *Adamson* (1) is altogether distinguishable from the present question. There the Court granted the *mandamus* because they came to the conclusion from the facts that the magistrates, in refusing the summons, declined jurisdiction. This is not a case of declining jurisdiction. The jurisdiction is to receive or refuse informations for a criminal offence. They have received informations. The question whether the place was a dwelling-house is not a matter of jurisdiction, but a fact to be determined on the evidence, like any other fact, as much as the identity of the person charged. And I am clearly of opinion the magistrates cannot be allowed to say they did not decide that fact. They did the act which the statute devolved upon them to do. They committed the accused. The act is their decision. The statute, which is supposed to have modified the common law, requires them simply to commit or discharge the person charged, and the case is committed, in the widest terms of discretion, to their opinion; and even a varying measure of judgment is provided, for the evidence may be sufficient, in their opinion, to put the accused upon his trial, or to raise a strong or probable presumption of guilt. Who can tell their opinion but themselves? or who can measure the degree of presumption but the party presuming? It is perfectly alarming to think of the consequences, if in the common tendency, out of a desire to meet a case of flagrant wrong or injustice, to push the law into new and unknown applications, such a fatal invasion of it were allowed. The precedent, as the learned Attorney-General could not but foresee, would be applied to other and different cases. Other people would come here. It is needless, in a law-abiding country, to specify a class who would be frequent in their attention to the Queen's Bench. But in the case of a powerful or wealthy offender he would have a thousand chances against justice. All that money and influence, and power and false art could do under the urgency of the strongest of human motives—the desperation of a struggle for reputation, liberty, or life—would be brought to bear, to the last extremity, to avert, or postpone, or prejudice prosecutions, until, in fact, the criminal law was choked in the fountain. For these reasons, I am

(1) 1 Q. B. Div. 201.

clearly satisfied that there is no power known to the law which can compel magistrates either to grant or refuse informations in indictable offences.

HOLMES, J.:—

The novelty, if not the importance of the application, justifies me in adding a few words to the judgments that have been delivered.

I accept two of the propositions argued by Mr. Campbell. I am of opinion that Justices in carrying out the provisions of the 14th and 15th sections of the Petty Sessions Act, are engaged in a judicial investigation, and that the conclusion they arrive at is a judicial determination. I am also of opinion that in the case before us the evidence contained in the depositions is not sufficient to put the accused on his trial, and that it does not raise a strong or probable presumption of his guilt. On the contrary, it appears to me that the witnesses for the prosecution, as well as for the defence, distinctly disproved the charge. It is an essential element in the crime alleged that a dwelling-house has been set fire to. A nice question of mixed law and fact may arise as to whether a particular house is a dwelling-house or not, and the Justices in most instances would exercise a wise discretion by leaving such a question to be decided by the ultimate tribunal. But this is not the present case. Here there was no house in existence at the time of the fire. It had been destroyed on the day before. Several men were engaged for hours in the work of demolition, and when they had finished, the walls were levelled almost to the ground, the roof, having fallen in, was broken up, and the site of what had been a house was occupied by a quantity of loose stones, thatch, and other rubbish. It is not alleged that any attempt was afterwards made to restore, even in a temporary way, the building, either in whole or in part. All that was done was to raise and prop up a portion of the fallen thatch of the roof, so as to enable some of the family to creep under it, and there sleep. Their dwelling-house had ceased to exist, and in regard to it they were then literally houseless. The bivouacking soldier who cooks his supper and passes the night in the open air, the tramp who makes a bed for himself under the shelter of a hay-

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF ROSCOMMON.

Holmes, J.

stack, the waifs and strays of a great city who are obliged to sleep under a railway arch or in the recesses of a bridge, are exposed to many hardships, but they cannot be made the victims of a burglary. For the time being, at all events, no one can break into their dwelling-houses.

The depositions taken in the proceedings against Blakeney raise no question of law, abstruse or otherwise. All that was required from the Justices was to draw from the facts deposed to the only inference consistent with common sense, and if they had done this they would, as a matter of course, have ordered the accused to be discharged. I am therefore of opinion that in committing him for trial they made a judicial mistake, which the Attorney-General was careful to state that he did not attempt or wish to justify. But can an error of this kind be corrected by means of a writ of *certiorari?* It is admitted that this depends upon whether the Justices in coming to the conclusion they did, acted in excess of or within their jurisdiction. *The Queen* v. *John Sullivan* (1) has been referred to. I consider myself bound by the judgment of this Division in that case. But even if I were at liberty to accept to the fullest extent the view of the Chief Baron, I would consider it inapplicable to proceedings before magistrates in cases of indictable offences. *In re John Sullivan* (2) was one of summary jurisdiction, and the foundation of the decision of the Exchequer Division was that when power to determine a criminal matter is conferred on a Justice, and he has proceeded therein according to the course of the common law in trials by jury, so far as it is applicable, his determination is final; but wherever this special power does not exist, or where the Justice has not proceeded therein according to the course of the common law, as modified by the particular statute under which he acts, he has exceeded his special power, or, in other words, acted without jurisdiction. This proposition does not apply to Justices taking depositions in indictable offences under the Petty Sessions Act. The provisions on this subject do not empower them to determine a criminal matter, and there is no analogy between these proceedings and a trial by jury. The object is not to decide on the guilt or innocence of the accused. It is to ascertain whether there are

(1) 22 L. R. Ir. 504. (2) *Ibid.* 98.

grounds for putting him on his trial according to the course of the common law. It is for the magistrate to say whether what is contained in the depositions is sufficient for this purpose, and the Legislature seems to me to have given him an absolute discretion in the matter. This is, I think, made evident, not only from the language by which the duty of Justices is declared, but also from the fact that no provision is made for embodying in any record the conclusion arrived at. The code of regulations for reducing to writing and preserving the orders and decisions of magistrates where they exercise summary jurisdiction does not apply when they investigate an indictable offence. In the latter case there are the written depositions. If the accused is sent to gaol to await his trial, there is the warrant of commitment. If he is admitted to bail, there is the recognizance; but there is no order declaring the determination of the Justices. In the case before us the memorandum in the order book merely directs the transmission of the depositions, and, as far as I can see, there is nothing in the statute to require even this entry.

No doubt, some written memorandum of what was done by the committing magistrates would be a useful precaution; but the inference I draw from the fact of its not being prescribed is that it was intended by the Legislature that an absolute discretion should be given to the Justices. It is laid down in some old text-books that a writ of *certiorari* goes only to a Court of Record. The proposition, thus stated, is, in my opinion, much too wide; but there can be no doubt that it will not be issued where there is no record or written document to be removed. The absence of all authority is a strong argument against Mr. Campbell. If the jurisdiction which this Court is asked to exercise exists, it is incomprehensible that it has never been successfully appealed to. In the case of *Ryan* v. *Goddard* (1), reported in a collection of cases printed under the direction of my Lord when he was Attorney-General, an application was made to this Division for a writ of *mandamus*, directing Justices who had taken depositions on a criminal charge, but who had discharged the accused, to commit him for trial. The application was refused, but Mr. Justice Fitzgerald is

(1) Judgments of Superior Courts, Ireland, 262; 15 Ir. L. T. R. 103.

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF ROSCOMMON.

Holmes, J.

reported to have said that the Court would, under certain circumstances, have jurisdiction to issue the writ applied for. If the learned Judge meant by this that such jurisdiction could be exercised in a case in which the magistrates held an investigation, and after considering the evidence determined in exercise of their judicial discretion to discharge the accused, it would, doubtless, be an *obiter dictum* on which Mr. Campbell may rely, but with which I am unable to agree. Where the Justices decline to enter upon, or to proceed with, an inquiry of this kind, this Court may compel them to perform their duty by writ of *mandamus*; but it has no right to interfere with them when they have done the very thing which the statute directs them to do.

Strong reliance was placed by Mr. Campbell upon the *argumentum ab inconvenienti*—upon the danger of giving uncontrolled authority to men without much legal training in a matter so important both to the community and to individuals. But in truth, the danger is very little. No great learning, and but moderate judicial aptitude is required to say whether a person accused of a criminal offence ought to be put upon his trial. Some common sense, and a little firmness in applying it to the facts—qualities in which magistrates, as a rule, are not deficient—will guard them from serious error. Such a case as that before us is exceptional; and it must be remembered that even where a mistake is committed there are means of remedying much of the injury that might arise from it. A bill of indictment may be laid before the Grand Jury, where the accused has been discharged by the Justices. The Grand Jury can ignore a bill where the evidence on which he is committed is insufficient. If it is found, the Attorney-General can enter a *nolle prosequi*; and a jury will not be permitted by the presiding judge to convict where there is no evidence of guilt. The ample power which this Court possesses to admit to bail, prevents the detention in custody of an alleged criminal, where the interests of justice do not require it. No system of jurisprudence can insure that an innocent man, or a man who ought not to be found guilty, will not be put on his trial; but our law interposes many safeguards between the first charge and the final investigation. For these reasons, I am of opinion that the conditional order must be discharged.

MADDEN, J. :—

I am of opinion that the magistrates in returning the accused for trial acted within their jurisdiction in a matter committed by statute to their determination. From this it follows that their decision cannot be questioned by writ of *certiorari*. That writ exists for the purpose of restraining inferior tribunals within the limits of their jurisdiction; not for the purpose of correcting any errors into which they may fall while acting within those limits. I content myself with stating the propositions upon which my judgment rests. As regards the establishment and application of these principles, I cannot usefully add anything to what has been said by the other members of the Court.

Solicitor for R. E. Blakeney: *H. B. St. George.*

Solicitor for the Justices: *Patrick Coll, Chief Crown Solicitor.*

G. G.

IN RE HOUSING OF THE WORKING CLASSES ACT, 1890; EX PARTE BIRCH (1).

Housing of the Working Classes Act, 1890—*Leave to appeal—Failure of justice—Practice.*

The Court will not give to a person whose lands have been compulsorily acquired under the provisions of the Housing of the Working Classes Act, 1890 (2), leave to appeal from the award of the arbitrator fixing the amount of compensation, merely on the affidavits of valuators who swear that in their opinion the amount awarded is less than the true value.

Meaning of words "failure of justice" in Schedule II., Art. 26, considered.

Semble—A claimant, to whom several sums, each less than £1000, but

(1) Before HOLMES, GIBSON, and MADDEN, JJ.

(2) 53 & 54 Vict. c. 70 (Housing of the Working Classes Act, 1890), 2nd Schedule.

"26. In the following cases, namely:—

. . . . . .

(*b*) Where any party claiming any interest in any moneys so paid into Court as aforesaid is dissatisfied with the amount of the price or compensa-

Q. B. Div. 1894.

amounting in the aggregate to more than £1000, in respect of an estate held under the same title, are awarded, may be given leave to appeal.

Application for leave to appeal should be made by motion on notice before the Court, or by summons in Chambers.

In re Housing of Working Classes Act, *Ex parte* Birch.

Motion.

The Lord Mayor, Aldermen, and Citizens of Belfast, being the local authority under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), took steps to acquire under the provisions of the Act certain lands situated in the city of Belfast. The lands were all held under the same title, and the applicant, James Patterson Birch (who was a lunatic), was tenant for life thereof. The property was subject to four leases affecting separate portions of the property, the remainder of which was in the applicant's own possession.

In the schedules deposited by the Corporation the four several parts of the lands subject to the leases, and the portion not subject, were separately set forth and numbered. The Corporation and the applicant not having agreed as to the amount of compensation, an arbitrator was duly appointed by the Local Government Board, and sat on the 11th April, 1892, and 9th May, 1892.

By direction of the Registrar in Lunacy the applicant, by his Committee, appeared by counsel before the arbitrator. On the 13th September, 1893, the arbitrator published his award, whereby he awarded to the applicant five several sums of money as compensation for the four portions subject to leases and the remainder

tion in respect of which such moneys are paid into Court, and such amount exceeds one thousand pounds; . . . . . .

the party dissatisfied may, upon obtaining the leave of the High Court, which leave may be granted by such Court, or any Judge thereof at Chambers in a summary manner, and upon being satisfied that a failure of justice will take place if the leave is not granted, submit the question of the proper amount of compensation to a jury, provided that such party give notice in writing to the other party of their intention to appeal within ten days after the cause of appeal has arisen.

The cause of appeal shall be deemed to have arisen—

. . . . . .

(2) Where moneys have been paid into Court, at the date of the payment into Court; . . .

of the lands respectively. Four of these sums were less than £1000; the fifth was a sum of £2678 1*s.* 2*d.*; the total of the sums awarded was £4479 5*s.* 4*d.*

On the 17th October, 1893, the Vice-Chancellor on an *ex parte* motion made an order giving liberty to appeal against the arbitrator's award, and notice of appeal was duly given to the Corporation. On the 25th November, 1893, in pursuance of five several warrants, the Corporation lodged the five several sums awarded by the arbitrator in Court to five separate credits; and on the 27th November, 1893, the Town Clerk called the attention of the solicitor for the applicant to the fact that the order of the Vice-Chancellor and the notice of appeal were premature and irregular, as having been made and given before the lodgment in Court of the compensation. The order and notice of appeal were then abandoned, and on the 5th December, 1893, an *ex parte* application was made to Mr. Justice Madden, sitting at Chambers, for an order giving leave to appeal. The motion was based on the arbitrator's award, an affidavit of the receiver over the applicant's estate, and a joint affidavit of three valuators. The latter affidavit was to the effect that the deponents had carefully examined and valued the property proposed to be compulsorily taken, that they were present and gave evidence of value at the arbitration, and heard the evidence put forward by the valuers for the Corporation; that they had seen the award, and believed that in the aggregate the amount awarded was considerably below the true value of the property. The affidavit concluded by the following paragraph:—

"We are of opinion that the award should not be accepted, and that the necessary steps should be taken to have the said award reviewed; and while we realise the risk which will be run in placing the matter for final determination before a jury, we nevertheless recommend that course in view of the probability of the amount of the award being increased; and we are further of opinion that a failure of justice will take place if leave to appeal be not granted."

Mr. Justice Madden made an order in the following terms:—

"It is ordered that the said James Patterson Birch, by his Committee, be at liberty to appeal in the manner provided by the said Act against the award of Edmund Murphy, Esq., dated the

Q. B. Div. 1894.

In re Housing of Working Classes Act, *Ex parte* Birch.

13th September, 1893; and to submit to a jury the amount of the price or compensation in respect of the lands and hereditaments of the said J. P. Birch, required to be taken by the said Lord Mayor, Aldermen, and Citizens of Belfast, under the said Act, in respect of which £4479 5*s.* 4*d.* was so awarded, unless cause shown to the contrary in one week after service of this order; and in the event of cause being shown, and such cause being allowed, it is ordered that leave to appeal in respect of part of the said award be given in the manner aforesaid, and to submit to a jury the question of the proper amount of the price or compensation to be paid in respect of that portion of the said lands and hereditaments in respect of which the sum of £2678 1*s.* 2*d.* was so awarded. Serving this order on the Town Clerk of Belfast."

An affidavit by Thomas Fisher and Robert Watt, and one by Sir Samuel Black were filed as cause. The former affidavit stated the opinion of the deponents that the amount awarded in respect of each portion of the lunatic's property represented considerably more than the true and full value of each such portion.

The present motion was on behalf of the Corporation for an order that the cause shown by the affidavits against so much of the order of the 5th December, 1893, as is conditional should be allowed, and that that part of said order should be discharged; and in respect of the latter part of said order which is not conditional in form that same should be set aside and discharged.

By consent the motion was treated as an original motion for leave of the Court to submit the question of the proper amount of compensation to a jury.

J. Walker Craig, Q. C. (*A. H. Bates*, with him), for the Lord Mayor, Aldermen, and Citizens of Belfast:—

No appeal lies at all in the four cases in which the amount awarded is less than £1000. Each item is a separate award. No objection was made to the arbitrator's dealing with the reversions in the four leases separately.

Moreover, with respect to all the sums awarded, the evidence is not sufficient to show that a failure of justice will take place if leave to appeal be not granted. In every case where land is compulsorily taken it is a matter of common observation that the

valuation made by witnesses for the owner is largely in excess of that awarded by the arbitrator; and if such discrepancy constitutes a "failure of justice," leave for an appeal must be granted in every case.

This provision has never received judicial interpretation; the only case I have been able to discover is *Ex parte Stevenson and Others* (1). The only point in dispute in that case was whether an appeal lies from a refusal of leave under Article 26.

James Campbell, Q.C., and *R. F. Harrison*, for the applicant:—

The five separate items amount to only one award. The lands are all held under one title; and the division into lots is only for the convenience of the arbitrator. It is the local authority which first prepares the schedules; and it would be monstrous that they could, by manipulating these schedules, dividing the property into lots the compensation for each of which would be under £1000, prevent the owner from appealing even in cases where hundreds of thousands of pounds might be involved. Nor can the right to appeal depend upon whether the property is subject or not to leases.

As to the requirement that the leave of the Court must be obtained, this provision is meant to check frivolous appeals; and it is sufficient to satisfy the Court that there is a substantial case. Here a very considerable difference exists between the valuation made by our witnesses and the arbitrator's award. The words "that a failure of justice will occur" must be read in connexion with the previous Acts where the amount awarded was made the sole criterion of the right to appeal. Hence the amount awarded must be an element in determining whether leave to appeal should be given.

Bates, in reply.

HOLMES, J.:—

Jan. 13.

This is, as far as I am aware, the first application of the kind that has come before this Court, and it has had its origin in the following circumstances:—The Town Council of Belfast, being empowered to acquire lands compulsorily under the provisions of

(1) [1892] 1 Q. B. 394, 609 (C. A.).

Q. B. Div. 1894.

In re Housing of Working Classes Act, *Ex parte* Birch.

Holmes, J.

the Housing of the Working Classes Act, 1890, took the necessary steps to have compensation assessed; and in the award of the arbitrator five sums, of which one exceeded and four fell short of £1000, were awarded to a Mr. Birch, who is described in the case of each lot as being entitled for an estate in fee-simple. This gentleman being himself a lunatic, his committee obtained, upon an *ex parte* application, an order from the Vice-Chancellor, acting as Vacation Judge, giving him leave to appeal in the manner provided by the second schedule to the statute. This order was premature; and it is admitted that it could not have been acted on. Under these circumstances, a similar application was made to my brother Madden, which resulted in the order now before the Court. We are all clearly of opinion that an order for leave to appeal under the provisions referred to can only be made on notice. It may be made either by the Divisional Court or by a Judge at chambers; but in either case notice of the application must be given to the party interested—the local authority, or the person entitled to compensation, as the case may be. It is possible that the words "in a summary manner," in the 26th section of the second schedule may have misled the Vice-Chancellor; and there are, doubtless, instances in which this expression has been construed as dispensing with notice; but we cannot so interpret it in the present case. "Summary" is here used in the sense in which we speak of "summary petitions," and it implies that the application may be made, although there is no action or proceeding in the Court, and without bringing up the award by writ of *certiorari* or otherwise. My brother Madden was quite of this opinion when the application came before him; but as the procedure was new, and as the order was asked for upon the last day on which it could have been made, he granted it in the conditional form in which it is now before us. The Court will, therefore, on this occasion, assume in favour of the proposed appellant, that his procedure has been regular; but it must be understood that for the future, as far as this Division is concerned, no application for leave to appeal, under the Act of 1890, will be entertained, unless due notice has been given previously. I wish to add, for myself, that although the order may be made at chambers, it seems to me that it would be more in accordance with

the principle on which business is distributed in this country, that it should be a Court motion; and I would suggest that where it is possible it be so treated. I now come to the substance of the application.

The mode in which compensation is assessed for lands compulsorily taken under the Housing of the Working Classes Act, 1890, differs from the provisions on this subject generally in use. In England the governing enactment is, as a rule, the Lands Clauses Consolidation Act, 1845, by which the compensation is ascertained either by a private arbitration or by a jury presided over by the sheriff without appeal. In Ireland, the Railways Act (Ireland), 1851, has substituted for this machinery an award by an arbitrator appointed by a Government Department, with an appeal by way of traverse at the Assizes. The Statute of 1890 adopts, in a less complicated form, the Irish mode of assessing compensation in the first instance, and gives, under certain circumstances, an appeal to a sheriff's jury. It is obvious, from the sections of the schedule that refer to appeals, that the policy of the Act is to make the determination of the arbitrator generally final and conclusive. There can be no appeal where the sum awarded to any person in respect of any estate or interest does not exceed £1000; and even where more than £1000 is given, leave to appeal must be obtained from the High Court, which can only grant it upon being satisfied that a failure of justice will take place if it is withheld.

It is objected by the local authority that the effect of the first part of this provision is that no appeal lies in respect of the portions of the property for which Mr. Birch has been awarded a separate sum not exceeding £1000. Although in the view we take of the case, it is not necessary to give a decision on this point, I have no hesitation in expressing my own opinion against this objection. The schedule that comes before the arbitrator is prepared by the local authority; and it is not unusual to divide into several lots lands held by the same person, for the same estate, and under the same title. There are often reasons of convenience and expediency for this course, but I can find nothing in the statute which makes the right of appeal depend upon whether the amount awarded to a person in respect of his estate

Q. B. Div. 1894.

In re Housing of Working Classes Act, *Ex parte* Birch.

Holmes, J.

or interest consists of a single sum or the aggregate of several sums. Here Mr. Birch is said, on the face of the award, to have an estate in fee-simple in certain premises indicated by reference to numbers on a map. Five sums of money are awarded to him for this estate, and whether the arbitrator adds them together or not, the total of those sums is the compensation payable to him. If such total exceeds £1000, he is entitled to have the decision of a jury as to what he ought to receive, provided he satisfies the Court that a failure of justice will otherwise take place. The words of the section imply, in my opinion, that leave to appeal can be given when the Court is satisfied that what has been done by the arbitrator has amounted to a failure of justice. It is not, however, necessary to establish that justice has been defeated in the result finally arrived at. No doubt, if it can be shown that the amount awarded exceeds or falls short of the value of the premises, leave to appeal ought to be granted. But a litigant has a right to something more than a decision that is not manifestly unjust. He is entitled to have his case presented and dealt with by the tribunal that hears it, in the way that the law permits and justice requires. If the arbitrator had rejected material evidence that was legally admissible, or had acted on evidence that he ought to have excluded, if he had disregarded elements of value which he was bound to regard, or if he had taken into account matters which ought not to have influenced him, if, in fact, there had been a violation of any principle the observance of which was necessary for the due administration of justice, I would hold that the condition required by the section to enable the Court to make the order had been fulfilled, even although I was not satisfied that the result finally arrived at was erroneous. But there is nothing of this kind in the case before us. There is an affidavit of three professional gentlemen, which, without giving a single figure, states that they had made a valuation that was much larger than the aggregate sum awarded, and it appears from the affidavit of the receiver that the arbitrator, in fixing the value, cut off about one-third from the amount deposed to by them. But no materials for testing their valuation are given us. We do not know how it was arrived at, whether it is the result of pure speculation, or whether it can be supported by prices actually

given for property similarly circumstanced, whether the witnesses were aware of the provisions of the statute dealing with the mode in which the value of lands is to be estimated, and if so, what effect they gave to them in making their valuation.

It seems to me that if, upon the evidence now before us, the Court were to give leave to appeal, there is no case in which such leave could be withheld. I doubt if anyone has ever heard of an assessment of compensation, with the view to lands being taken compulsorily, in which the valuation made by expert witnesses on the part of the owner did not far exceed the amount of the award. I must credit the Legislature with the possession of ordinary knowledge, and I must assume that if it considered that this circumstance would in itself entitle the owner to appeal, it would have allowed him to do so without an order of this Court. Indeed, if I were to place a construction on the section much more favourable to the appellant than that which I feel bound to give it, if I were to hold that it only requires the Court to be satisfied that a failure of justice *may* take place if leave is not given, no grounds for the order have been shown in this case. We allow the cause against the order in so far as it is conditional, and we rescind so much of it as is absolute.

GIBSON, J. :—

The object of Article 26 plainly was to check appeals, and expedite the acquisition of land under the statute. Before giving leave to appeal the Court must be satisfied that there *will* be (not *may* be) a failure of justice if the leave is not given. This might happen in various ways: for instance, if the claimant had no notice, and there was no appearance or evidence on his behalf, before the arbitrator, which might readily occur, the provisional award under the Act of 1875 being replaced by a final award under this Act; or there might be a mistake in calculating; or the award might be opposed to the weight of the evidence. Whether the article means that the Court must be satisfied affirmatively that there *has been* a *prima facie* failure of justice before the arbitrator, it is not necessary to decide, though this is the obvious construction. The Court, as its decision is final, must be cautious, so as not unduly to restrict the limited right

Q. B. Div. 1894.

In re Housing of Working Classes Act, *Ex parte* Birch.

Gibson, J.

of appeal. In such a case as this, however, to justify the Court in giving leave, there must be evidence to satisfy the Court that there is a fair and reasonable likelihood that the amount of compensation ought to be increased. There is no such evidence here. An appeal cannot be allowed against the decision of the arbitrator (which the Act assumes to be *prima facie* right and final), merely because the valuers on each side arrive at inconsistent results, and are ready to swear in general terms that they believe their valuations to be correct, which is a matter of opinion. In the Act there are elaborate directions as to the mode of valuation to which the affidavits do not in any way refer. In *Ex parte Stevenson* (1) I observe that Mr. Justice Wright refused the application for leave to appeal, though the case was obviously of a substantial character, and probably elicited the usual conflict of opinion on the part of the professional witnesses.

I agree that the Court cannot give leave *ex parte* without notice, and that an absolute *ex parte* order would be wrong. In the case before Mr. Justice Wright, the summons was served on the Corporation. If the Act contemplated an unappealable *ex parte* application, it would appear that only the affidavits on behalf of the applicant ought to be considered.

As to the point that the aggregate amount awarded is what decides the right to appeal, where there is one estate, one title, and one award, I am inclined to agree with Mr. Campbell's argument. It would be curious if the right of appeal depended on the accidental circumstance of the number of tenancies, and the mode of assessment adopted by the arbitrator for his own convenience. The fee-simple of the estate taken from the owner is what is to be valued. It might be different if there were different titles and estates. It is, however, unnecessary now to decide this point.

Madden, J. :—

Having regard to the grounds upon which my judgment rests, it cannot afford a precedent for any future case; but as my brethren have expressed an opinion upon the construction of this statute, and as this appears to be the first occasion upon which the

(1) [1892] 1 Q. B. 394, 609 (C. A.).

questions involved in this case have come before any Court for decision, I will shortly state my view of the provisions of the Act respecting the right of appeal from the award of the arbitrator.

The language of Article 26 of the second schedule is peculiar. I am not aware of any other statute in which the expression "failure of justice" occurs in provisions regarding appeal. As my brother Holmes has pointed out, successive restrictions have, from reasons of public policy, been placed upon the right originally possessed by every person whose land was compulsorily taken to have the amount of compensation assessed by a jury. These restrictions were applied in the first instance to cases where the sum awarded was small, but by the statute under consideration a new limitation was applied, irrespective of the amount awarded by the arbitrator. When the sum awarded does not exceed £1000, the right of appeal is absolutely taken away. In other cases an appeal cannot be taken as a matter of right, but the person desirous of bringing his case before a jury must obtain leave from the High Court, or a Judge, and this leave cannot be obtained unless the Court is satisfied that a failure of justice will take place if the leave is not granted. The question is, what is meant by a failure of justice?

I do not think that the statute has imposed upon the applicant the *onus* of satisfying the Judge that an actual failure of justice in the proceedings before the arbitrator has taken place. The failure of justice referred to is something to take place in the future, if leave to appeal is refused. Nor can I accept the view that the applicant is bound to satisfy the Judge, as a condition to obtaining leave to appeal, that there would otherwise be a failure of justice by reason of the sum awarded being too small. There is, of course, a failure of justice wherever this occurs, but I cannot think that this is the particular kind of failure contemplated by this Act, inasmuch as it would be absolutely impossible for any Judge to be satisfied that such a failure would take place, unless he had himself heard all the evidence, and practically decided on the merits of the case.

What, then, does the statute mean by a failure of justice? The expression may not be a felicitous one, but I cannot distinguish it from a provision that the Judge must be satisfied before he

Q. B. Div. 1894.

In re Housing of Working Classes Act, *Ex parte* Birch.

Madden, J.

gives leave to appeal to a jury that such a proceeding is just. If it is just and right, having regard to the nature of the case, and to all its circumstances, that the final decision should not rest with the arbitrator, but be brought before a jury, there would be, in my opinion, a failure of justice within the meaning of the statute, if leave to appeal were refused, even though the sum awarded by the arbitrator might turn out to be in itself just and adequate, and although no specific failure of justice in the proceedings before the arbitrator were proved to have taken place.

Has, then, the applicant satisfied this Court that it is just that he should be allowed to appeal to a jury? I agree in thinking that he has not. The affidavit upon which he relies treats the appeal as a purely speculative one, in which he may possibly be awarded a less sum than that given by the arbitrator. His case is founded on a difference of opinion between skilled valuers. These elements exist in every case, and it is quite plain that the statute intended that the decision should be final in such a state of facts.

J. Walker Craig, Q.C., asked for costs.

James Campbell, Q.C.; We have substantially succeeded on the principal matter in dispute.

Gibson, J.: This is the first decision on a difficult section of a recent Act of Parliament.

Holmes, J.: Each party will abide their own costs.

Solicitor for the applicant: *Charles C. Craig.*

Solicitor for the Lord Mayor, Aldermen and Citizens of Belfast: *Sir Samuel Black.*

G. G.

BREW AND GLYNN, TENANTS; STACKPOOLE, LANDLORD (1).

Land Com. 1893. Nov. 21. Dec. 5. 1894. Jan. 26.

Advances by Commissioners of Public Works—Compensation for improvements —Claim of Commissioners against moneys awarded to tenant.

A tenant from year to year of lands in the county of Clare applied for and obtained from the Commissioners of Public Works, under the 31st section of the Land Law (Ireland) Act, 1881, a loan of £375, to be expended in drainage and erecting farm offices, and executed a deed whereby he charged all his tenancy estate and interest in the lands, with the payment to the Commissioners of the advances and interest. The tenant's interest was sold under a writ of *fi. fa.* to Brew and Glynn, who subsequently surrendered the tenancy to the landlord, and, on the 27th November, 1888, served a claim for compensation for improvements for £498 3*s.* 4*d.* The County Court Judge disallowed the claim. The Commissioners of Public Works, having obtained leave to intervene, appeared on the hearing of the appeal before the Land Commission, and claimed to be mortgagees of the compensation moneys. No claim was made by the Commissioners against the landlord or his estate. The Land Commission having ascertained that the claimants were entitled to £237 10*s.* compensation, it was *held* that the claim of the Commissioners of Public Works to have a charge on the amount of compensation awarded was unsustainable.

APPEAL from an order of the County Court Judge of the county of Clare, dismissing with costs a claim for compensation for improvements under the Landlord and Tenant (Ireland) Act, 1870. The facts are fully set out in the judgment of Mr. Justice Bewley.

Vesey Fitzgerald, for the Commissioners of Public Works:—

It has been held under the Lands Clauses Act that a mortgagee was entitled to a sum which had been awarded in respect of the loss of profits in carrying on the business, and that such sum was in the nature of compensation for the value of the goodwill of the business which passed with the premises: *Ex parte*

(1) Before BEWLEY, J., and FITZGERALD, Q.C., Commissioner.

Land Com. 1893.

BREW AND GLYNN, *Tenants;* STACKPOOLE, *Landlord.*

Lambton (1); and the exception is where the good-will depends on the personal skill of the owner, and does not pass to a mortgagee of trade premises. *Cooper* v. *Metropolitan Board of Works* (2) affords an argument that the good-will of a tenancy also passes to the mortgagee. The 6th section of the Conveyancing Act, 1881, provides that a conveyance of lands, which includes a mortgage, passes "all buildings, erections, fixtures, hedges, ditches, fences, ways," everything that is here claimed as an improvement, and applies to all improvements made before the deed of charge was executed. The maxim "*Quidquid plantatur solo solo cedit*" combined with the analogy of the law by which fixtures belong to the mortgagee, although attached to the premises after the mortgage (*Mew* v. *Jacob* (3); *Cullwick* v. *Swindell* (4); *Chisham* v. *Jews* (5)) indicates that the improvements effected with the public loan should be regarded as an accretion to the Commissioners' security. [Counsel also referred to the definition of "tenant," "tenancy," and "holding," in the 57th section of the Land Law (Ireland) Act, 1881.]

W. F. Kenny, for the claimants :—

The deed of 31st May, 1883, is not a mortgage, but is simply a deed of charge on whatever interest the tenant had: *Attorney-General* v. *Fetherstonhaugh* (6).

The deed left the legal estate in Brew and Glynn; and the only interest under 10 Vict. c. 32, was a tenancy from year to year; and the lands came into the hands of the landlord freed from the charge of the Commissioners of Public Works.

The appellants have only a claim enforceable against the landlord personally, and have no claim against the lands. As against the lands, they have only a right to retain possession until the compensation under that Act be paid; such a right to retain possession gives no estate in the lands: *Hemphill* v. *Frazer* (7).

[Counsel referred to *Attorney-General* v. *Ireland* (8); *Commis-*

(1) 3 Ch. Div. 36.
(2) 25 Ch. Div. 472.
(3) L. R. 7 H. L. at pp. 491–493.
(4) L. R. 3 Eq. 249.
(5) 5 Russ. 30.
(6) 30 L. R. Ir. 614.
(7) 10 L. R. Ir. 87.
(8) 15 L. R. Ir. 145.

Land Com. 1893.

BREW AND GLYNN, *Tenants:* STACKPOOLE, *Landlord.*

1894. Jan. 26.

sioners of Public Works v. *Symes* (1); and to sections 16, 17, 18, 23, and 25 of the Landlord and Tenant (Ireland) Act, 1860 (23 & 24 Vict. c. 154).]

Cullinane, for the landlord.

BEWLEY, J.:—

This case came before us on an appeal from an order of the County Court Judge, dated the 17th October, 1890, dismissing, with costs, a claim for compensation for improvements under the Landlord and Tenant Act, 1870.

In and prior to the month of May, 1883, Richard O'Donnell was tenant from year to year of part of the lands of Cloonmore, in the county of Clare, containing about 112 statute acres, at the yearly rent of £120, and upon this holding various improvement works in the way of building, fencing, and reclamation (being Nos. 1 to 9 in the claim), had been effected by Richard O'Donnell or his predecessors in title, James and Patrick Healy. In 1883, Richard O'Donnell applied to the Commissioners of Public Works, under the 31st section of the Land Law (Ireland) Act, 1881, to lend him a sum of £375, to be expended in drainage and erecting farm offices on the lands, and the Commissioners agreed to make the loan upon the terms of the tenant executing a deed of charge in the form usual in such cases, and upon having the repayment of the loan further secured by the covenant of two sureties.

Accordingly, by a deed dated the 31st May, 1883, made between Richard O'Donnell of the one part and the Commissioners of Public Works in Ireland of the other part, after reciting the tenancy and the agreement for the loan, it was witnessed that in consideration of the sum of £375 agreed to be lent, the tenant thereby charged that part of the lands of Cloonmore, in his occupation, situate in the barony of Ibricken and county of Clare, "and all his tenancy estate and interest therein," with the payment to the Commissioners or their assigns of all advances from time to time made to him by the Commissioners in pursuance of the said agreement, with interest on such advances at the rate of £3 10*s.* per cent. per annum. This was followed by a proviso

(1) 32 L. R. Ir. 598.

Land Com. 1894.

BREW AND GLYNN, *Tenants*; STACKPOOLE, *Landlord.*

Bewley, J.

that if the tenant, his executors, administrators, or assigns, should pay to the Commissioners or their assigns, during a period of twenty-two years, an annuity of £6 10*s.* in respect of every instalment of £100 advanced, and so in proportion for every lesser sum by equal half-yearly payments on the days therein mentioned the Commissioners would not call in the loan, and that if the tenant discharged the loan in manner aforesaid the Commissioners would release the tenant, his executors, administrators, or assigns, and the said lands, and his tenancy estate and interest therein, from the sums so advanced and the interest thereon. There was a further proviso that if the tenant made default for six calendar months in payment of any instalment, all the advances made by the Commissioners, with interest thereon, so far as such advances and interest were then unpaid, should forthwith become payable by the tenant, his executors, administrators, or assigns, to the Commissioners or their assigns, as a present debt.

Upon this deed was indorsed a deed of covenant executed by two sureties.

With the money advanced by the Commissioners, which amounted to about £300, Richard O'Donnell executed the drainage and other works, Nos. 10 to 15 in the claim.

Richard O'Donnell appears to have got into difficulties, and in the year 1885 his interest in the holding was seized by the sheriff under a writ of *fi. fa.*, and sold to Michael Glynn and William Brew, creditors of O'Donnell. The purchase-money was a sum of £126, and by a deed dated the 18th July, 1885, Richard O'Donnell's interest was duly assigned by the sheriff to the purchasers. Notwithstanding the sale and conveyance, possession of the holding was retained by O'Donnell, but eventually an ejectment on the title, grounded on the sheriff's conveyance, was brought by Glynn and Brew, and judgment for possession obtained. The writ of possession appears to have been executed on the 1st November, 1888, and either simultaneously with the execution of the writ, or some short time afterwards—the date is not material—the holding was delivered up, and the tenancy surrendered by Michael Glynn and William Brew to the landlord.

On the 27th November, 1888, a claim for compensation for improvements was served by William Brew and Michael Glynn,

claiming in the whole the sum of £498 3*s.* 4*d.*, and on the 18th December, 1888, notice of dispute was served by the landlord. Michael Glynn afterwards died, and a grant of letters of administration, with his will annexed, was duly obtained by Henry R. Glynn, and the claim having come on for hearing before the County Court Judge, was dismissed, on the ground that the claimants had entirely failed to establish their claim for improvements or any part thereof.

On the 23rd July, 1892, an order was made by the Land Commission, giving liberty to the Commissioners of Public Works to intervene, and they accordingly took an active part on the hearing of the appeal before us, in support of the claim, asserting that by virtue of the deed of the 31st May, 1883, they were mortgagees of any sums that might be awarded to the claimants on foot of their claim.

Evidence of the execution of the improvements claimed, and of their value, was given, and after a careful investigation of the several items, we are of opinion that the claim has been established to the extent of £237 10*s.*, viz. £72 10*s.* for works executed prior to the loan from the Commissioners, and £165 for works executed with the proceeds of the loan.

Both at the hearing before us at Ennis, and on the legal argument which subsequently took place in Dublin, no claim was made by the Commissioners of Public Works in respect of the loan against the landlord or his estate. It appeared to me on elementary principles that when the holding was surrendered to the landlord in 1888, the landlord took it subject to any subsisting incumbrances created by the tenant, and that the charge by Richard O'Donnell in favour of the Commissioners of Public Works should be deemed to continue, notwithstanding the surrender. However, in reply to a communication from the Secretary of the Land Commission to the solicitor for the Commissioners of Public Works, a letter dated the 18th instant was received to the effect that the matter had been laid before the Commissioners, and that they did not intend to make any claim against the landlord's estate other than the claim they have made in this matter. I refer to this, because if the landlord were to be subject hereafter to any claim by the Commissioners of Public Works under the

Land Com. 1894.

BREW AND GLYNN, *Tenants*; STACKPOOLE, *Landlord.*

Bewley, J.

deed of the 31st May, 1883, the claim for improvements should be dealt with on a different basis. However, as matters now stand, the sole question for determination over and above the amount of the compensation for improvements is the claim of the Commissioners of Public Works to be mortgagees of the compensation moneys.

By the deed of the 31st May, 1883, Richard O'Donnell charged the amount of advances and interest on that part of the lands of Cloonmore in his occupation, "and all his *tenancy*, *estate*, *and interest* therein," but did not specifically charge or refer to any right of compensation for improvements; and unless the moneys now awarded or the right to claim these moneys can be considered as an "interest" in the lands of Cloonmore occupied by the tenant, it appears to me that the claim of the Commissioners must necessarily fail. The improvements themselves, *in specie*, have gone to, and are now vested in, the landlord; and the cases cited in reference to the mortgages of fixtures and machinery do not seem to have any direct bearing on the point. If the Commissioners proceed to enforce their claim against the lands, the improvements would undoubtedly be subject to their charge.

The right to compensation for improvements arises under section 4 of the Landlord and Tenant Act, 1870, which provides:—"Any tenant of a holding who is not entitled to compensation under sections 1 and 2 of this Act, or either of such sections, or if entitled does not make any claim under the said sections, or either of them, may on quitting his holding, and subject to the provisions of section 3 of this Act, claim compensation to be paid by the landlord under this section in respect of all improvements on his holding made by him or his predecessors in title."

This is a personal claim against the landlord, to be satisfied by the payment of money.

The proceedings in respect of claims under the Act, whether for disturbance or compensation, or otherwise, are regulated by the 16th and following sections.

[His Lordship referred to sections 16, 17, 18, 19, 23, and 25.]

Under the provisions of the 21st section a tenant decided by the Court to be entitled to compensation to be paid by any landlord cannot be compelled to quit his holding until the amount of

compensation due to him has been paid or deposited; but the compensation-moneys are not made in any way a charge on the holding; and I fail to find any language in the Act that can be construed as in any way making the amount awarded for compensation a charge on the holding, or constituting the right to compensation an interest in land.

Land Com. 1894. BREW AND GLYNN, *Tenants;* STACKPOOLE, *Landlord.* Bewley, J.

This claim of the Commissioners to have a charge on the amount of compensation awarded by virtue of their deed, therefore, appears to me to be unsustainable.

The order of the County Court Judge must be reversed, and the claimants' appeal allowed with costs, to be paid by the respondent to the claimants. If the costs awarded by the order of the County Court Judge have been paid they must be refunded.

The order now made will set out in detail the amount allowed by us in respect of the several items of the claim.

Solicitor for the landlord: *Kerin.*

Solicitor for the tenants: *Thomas Kelly.*

Solicitor for the Commissioners of Public Works: *P. Coll.*

T. H. M.

RE MURPHY'S PRESENTMENT (1).
(CO. MAYO PRESENTMENTS, 1893.)

Cr. Cas. Res. 1894. Feb. 15.

County cess—Application of surplus moneys arising from one barony to another—The Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 145.

Under 6 & 7 Wm. 4, c. 116, s. 145, the Grand Jury is authorized to apply the surplus (if any) arising from one barony, after all liabilities thereon have been discharged, to meet undischarged liabilities of another barony or the county at large.

At the ensuing assizes the amount of such surplus must be raised off the barony to whose liabilities it was applied, and must be replaced to the credit of the barony whose surplus it was.

CASE RESERVED by the Lord Chief Baron at the Co. Mayo

(1) Before PALLES, C. B., O'BRIEN, JOHNSON, ANDREWS, MURPHY, and MADDEN, JJ.

Cr. Cas. Res. 1894.

Re MURPHY'S PRESENTMENT.

Summer Assizes, 1893, for the opinion of the Judges, as to the liability of the Grand Jury of the County of Mayo to pay the contractors for public works executed in the barony of Erris. The case was in the following terms :—

"At the last Assizes for the county of Mayo, Mr. Taylor, Q.C., and another, of counsel for various persons, in this case referred to as the Erris contractors, applied to me for an order, under 30 & 31 Vict. c. 46, s. 4, directing the National Bank, the treasurer of the county, to pay such contractors the amounts due to them on foot of their respective contracts, upon the ground that the Secretary of the Grand Jury, and the Clerk of the Crown and Peace, might respectively have lawfully signed and countersigned drafts for the payment of such sums, and had refused to do so.

"These contracts had been duly entered into with the Grand Jury, and applications for payment of the sums in question had been duly made to, and approved of at, the Presentment Sessions, and proper certificates had been given by the County Surveyor. At these Assizes the applications were allowed by the Grand Jury, under sect. 116 of 6 & 7 Wm. IV., c. 116, subject to the determination by the Court of the fund out of which such contractors were entitled to be paid.

"It appeared that some of the county cess applotted upon the barony of Erris remained in arrear, and that the amount of county cess of such barony, collected and in bank at the time of the Assizes, was not sufficient to pay the full amount due to those contractors.

"The total amount, however, in the hands of the treasurer (consisting of county cess collected from all the baronies, including Erris, within the county) was sufficient to meet all the liabilities, as well of all the baronies, including Erris, as of the county at large.

"The Grand Jury were of opinion that the contractors for works, which (as between the county and the barony of Erris) were to be borne by that barony, were entitled to look to, and to be paid only out of, the funds collected from that barony as distinguished from the general funds of the county. They accordingly passed the following resolution :—

"'Resolved—That the Secretary and Clerk of the Crown and

Peace shall sign and countersign cheques to such contractors as shall be satisfied to receive proportionate payment on foot of their respective contracts as the funds will admit.'

"These officers considered that such a course would be illegal, and refused to comply with such resolution, being of opinion that they should either pay the sums in full, or not at all; and the contractors refused to accept less than the full amounts due to them.

"The officers accordingly appeared before me by counsel, and objected to the aforesaid resolution and presentment.

"I was of opinion that, although as between Erris and the other baronies, the amounts payable to the contractors should be borne by Erris only, the contractors were entitled to be paid out of the moneys in the hands of the treasurer, irrespective of the barony out of which they had been collected, and irrespective of whether, as between such baronies and the county, they represented the funds of the county at large, or those of any particular barony.

"However, Lord John Browne, the foreman of the Grand Jury, having stated to me that the Attorney-General had given an opinion to the opposite effect, and that the case was one which was likely to frequently arise in reference to the barony of Erris, I consented to reserve the question for the opinion of the Judges.

"In consequence of this reservation, arrangement was subsequently made by the Grand Jury, by which (in order to avoid the inconvenience which would be caused by the payments to all the contractors being delayed), provision was made for the payment of all the contracts but one, that one being excepted to enable the questions raised to be determined upon this case" (1).

The question reserved for the opinion of the Judges was:—

"Whether the contractor, Michael Murphy, is, under the circumstances stated in the case, entitled to payment out of the funds in the hands of the treasurer, to the credit of the county (irrespective of the barony from which the same have been

(1) Copies of—1, the tender for the work, the subject of that one contract; 2, the presentment accepting it; 3, the presentment for payment, passed Spring, 1893, were set out in an appendix.

Cr. Cas. Res. 1894.

Re MURPHY'S PRESENTMENT.

collected), of the sum due on foot of his contract, which was approved of at the Presentment Sessions, and allowed by the Grand Jury?"

The Attorney-General (*The Mac Dermot, Q.C.*), and *Nolan, Q.C.*, for the Grand Jury :—

The payment is illegal. The application of the cess collected from particular baronies or from the county at large to the expenses of another barony is not warranted by the statute; each barony is a distinct entity, and it would be a gross injustice to impose upon one barony the burden of discharging the debts of another, or of paying for the maintenance of roads at the other end of the county. There is no machinery for replacing funds so applied, and even if that could be legally done, there might be practical difficulties, especially in the case of a poor barony deeply in arrear. Section 145 of the Grand Jury Act does not sanction such an application of such surplus funds. The surplus moneys, which that section makes applicable to "any public work or any county charge," are moneys recovered from defaulting officials, balances on salaries of county officers, and *such like* surplus and balances of money. This section evidently was intended to deal with moneys which had originally been raised as from the county at large, and "any public work" within this section must be taken to refer to *county* works alone.

J. H. Campbell, Q.C., Taylor, Q.C., and *Staunton*, for the Erris contractors :—

Barony charges must, of course, immediately or ultimately, be borne by the particular barony; and, if there be a deficiency, the unpaid charges must be provided for at the following Assizes by a re-presentment for the necessary amount. The question here is whether the Grand Jury has authority temporarily to apply surplus money, arising from one barony, to meet undischarged claims upon another. This is not a question of justice or injustice, but of book-keeping. The barony whose surplus has been so applied must get credit for the amount at the ensuing Assizes, while the other barony must make good the amount received.

Section 145 (the latter parts of which are left untouched by 19 & 20 Vict. c. 63, ss. 5 and 6) expressly sanctions this view; a baronial surplus can only arise where all the expenses of that barony have been discharged; and therefore the only possible application of such baronial surplus is to the other baronies or to the county at large.

Nolan, Q.C., in reply.

[Counsel during the arguments referred to the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, cap. 116), ss. 10, 12, 14, 16, 17, 22, 23, 25, 26, 35, 36, 38 (amended by 20 & 21 Vict. c. 15), 47, 50, 51, 52, 55, 61, 62, 130, 140, and 145; to 30 & 31 Vict. c. 46; and to *Re County Mayo Presentments*, 1861 (1); *Re Bradley* (2); *Re Road Contractor* (3)].

PALLES, C.B.:—

This case has been very fully argued, and the majority of the Court—that is all the Judges present, save Mr. Justice O'Brien, and Mr. Justice Madden—are of opinion that this payment can be and ought to be presented by the Grand Jury.

To make clear the view of the Court upon the matter, I have introduced into the question submitted for our consideration a few words to show that the fund, out of which, we think, the sum due on this contract is payable, is so much only of the moneys in the hands of the Treasurer of the county as shall remain after payment of any other existing baronial charges, and any county-at-large liabilities, in other words, the balance or surplus in the strictest sense.

The facts upon which the question arises are few and simple. It appears that some of the county cess, applotted upon the barony of Erris, remains in arrear, and that the amount of cess, collected from that barony and lodged in bank, was not sufficient to pay the full amount due to the contractors for baronial works.

There is, however, a balance in the hands of the Treasurer, derived from the rest of the county, which is more than sufficient to pay all the county charges and all the other baronial charges:

(1) 14 Ir. C. L. Rep. 392. (2) Ir. Cir. Rep. 320. (3) 3 Ir. L. T. 426.

Cr. Cas. Res. 1894.

Re MURPHY'S PRESENTMENT.

Palles, C.B.

that is, the total amount in the hands of the Treasurer is more than sufficient to meet all the liabilities as well of the different baronies (including Erris), as of the county at large.

The case has been put by Mr. Campbell upon the construction of the 145th section of 6 & 7 Wm. 4, c. 116; and it is upon that section alone that the Court expresses any opinion.

The concluding words of the section are:—"And such money so paid, and any balance, arrears of, or surplus on the salary of any county officer, and all other such like surplus and balances of money raised by authority of this Act, or which may anyhow arise in the hands of any county treasurer, shall be applicable to defray the expenses of *any public work* or *any* county charge *whatsoever* which the Grand Jury are authorized to present under the provisions of this Act, and *shall be* presented by the Grand Jury for such of the said purposes as to them shall seem expedient." I am of opinion that "public work" in this enactment is not confined to public works chargeable to the county at large, but includes works to be paid for by a barony. As to this, it is sufficient to refer to the preamble of the Act and to section 1. The preamble states that "it is expedient, with a view to secure the better execution of *public works*, and facilitate the transaction of local business, that the [Grand Jury] laws should be consolidated and amended, and that a uniform system of raising money by presentment of Grand Juries should be established in all counties in Ireland." The term "public works" is there used in its general sense, as including all works authorized by the Grand Jury, whether they are to be paid for by the county, or by a particular barony. Then sect. 1 enacts:—"It shall not be lawful for any Grand Jury . . . at any Assizes to make any presentment (save and except in the cases hereinafter specially reserved and excepted) for the execution of any *public work whatsoever*, or for raising any money, unless under the authority and by virtue of the provisions of this Act." We have there expressions correlative to those used in section 145. "*Public works*" occur in each; and the words "*raising any money*" in section 1 are correlative to "*any county charge whatsoever*" in section 145. Again, the words, which describe the money which is in the hands of the County Treasurer, are of the most general description—"or which may anyhow arise in the

hands of any County Treasurer." These words contemplate and include as well a balance of money, which has been raised from, and is primarily applicable to, a barony, as a balance which may be primarily applicable to the county at large.

Now these balances, it is declared, "shall be applicable to defray the expenses of any public work which the Grand Jury are authorized to present under the provisions of this Act, and shall be presented by the Grand Jury for *such of* the said purposes as to them shall seem expedient." Thus, the Grand Jury have not a discretion to refuse to present or to present, as they think fit; their power is one of selection only. If there be more works within the section than the surplus funds are sufficient to pay for, the Grand Jury are authorized to select the works, of which they will present the expenses; but in the present case it is found that the amount in the hands of the Grand Jury is more than sufficient to pay for all the works of which the expenses remain unpaid. The whole question, therefore, in my opinion, arises on the proviso—"Provided always that such sum shall be applied to the credit of any county or barony off which it is originally levied." What is the meaning of this proviso? One rule of construction is that we ought to read any statutable provision in a sense in which it is capable of having some effective operation. Now, take the case of a surplus existing of that which is primarily a barony fund. Such a surplus cannot exist until all the expenses of public works within that barony, which are payable by the barony, have been presented and provided for; and therefore there cannot be, in that particular barony, any public work towards the expenses of which the balance could be presented at the particular Assizes. Therefore, the section must contemplate that the public work, to the expenses of which the surplus or balance is applicable, is a work the expense of which is not primarily payable by the barony. It is, therefore, impossible that the words, "such sum shall be applied to the credit of any county or barony off which it was originally levied," can mean "shall be actually applied at the Assizes in question in payment of works, for which the county or particular barony having the surplus is primarily liable." Such a construction would deny any operation whatsoever to the enactment. It is clear to me that the only construction which will give

Cr. Cas. Res. 1894.

Re MURPHY'S PRESENTMENT.

Palles, C.B.

the section any operation is that the sum shall be deducted, as a credit, from the gross sum which otherwise would have been presented at that Assizes, to be levied out of the county or barony, as the case may be, and that the difference only should be presented, to be levied out of such county or barony, the statute contemplating that, at the next Assizes, the funds of the barony, whose work has been presented, to be paid out of the surplus, will be sufficient to recoup the county or barony whose surplus had been presented for expenses primarily to be borne by another fund.

I shall make this clear by an example. Take it that the barony of Connemara had a surplus of £100, and that the barony of Erris had a deficiency of £100. The Grand Jury at the Assizes would have ascertained that a certain sum, say £1000, would be required to meet the Connemara charges, which would be payable at the next Assizes, and that £1500 would be required to pay the similar charges for Erris at the next Assizes. Upon my construction of the section, the £100 surplus arising out of the barony of Connemara ought to be applied to meet the deficiency arising in the barony of Erris. But any part of this arrear on the barony of Erris, which would not remain collectable after the last assizes, should be re-presented; so that the £100 arrear would be leviable out of that barony in addition to the £1500 required for the next half-year; whilst, on the other hand, credit must be given to the barony of Connemara for this amount of £100, and deducted out of the £1000 required to be forthcoming from that barony at the next Assizes. Thus the total sum to be presented against Connemara would be £900 instead of £1000.

I cannot find anything in the other parts of the section antagonistic to this construction.

I agree with the Attorney-General that the general scope of the Grand Jury Laws is that the barony charges should be raised out of the barony, and the county charges out of the county at large; but the Act provides that, in some instances, there may be a right to pay, in the first instance, out of the county at large, sums which ultimately must be borne by the barony. For instance, there is a provision that, when baronial works are given in charge to the County Surveyor, the expenses incurred by that officer are to be

paid in the first instance out of the funds of the county at large, and those funds are afterwards to be recouped by those of the barony. Section 145 is another provision of the same class. The latter section does not change liability, but merely authorizes the use of the balance of the county, or of one barony, for the benefit of another barony, or of the county at large, until the next Assizes come round.

The form in which the opinion of the Court will be given upon the question submitted will be:—"That the contractor, Michael Murphy, is, under the circumstances stated in the case, entitled to payment, out of the funds (not required to meet any other baronial or county liability) in the hands of the Treasurer to the credit of the county (irrespective of the barony from which the same have been collected), of the sum due on foot of his contract, which was approved of at the Presentment Sessions and allowed by the Grand Jury."

Solicitor for the Grand Jury: *A. B. Kelly.*
Solicitor for the Erris contractors: *J. W. Garvey.*

A. E. R. J.

Ex. Div. 1893.
Jan. 16, 17, 18, 20.
Appeal. Feb. 22, 23.

CUMMING *v.* THE GREAT NORTHERN, MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE JOINT RAILWAYS (1).

(1891. No. 352.)

Carriers—Land and sea carriage—Contract, where entered into.

The plaintiff's cattle were shipped at Dundalk for the purpose of being carried to Cambridge under the following circumstances. They were conveyed from Dundalk to Liverpool by the Dundalk Steam Packet Company, and from Liverpool to Cambridge by the defendants, who had statutory running powers over a line of railway from Liverpool to Godley Junction, and were owners of a line from Godley Junction to Cambridge. The cattle were injured during the railway journey through the negligence of the defendants; but in order to sustain the action in Ireland the plaintiff was bound to prove a contract of carriage entered into at Dundalk. There are three railway lines from Liverpool to Cambridge. The Railway Companies have no traffic agreement with the Steam Packet Company, but send to the Steam Packet Company books of blank manifests, and employ canvassers, paid by commission, to induce shippers to select their employers' route. In relation to the plaintiff's cattle, two documents were signed at Dundalk—first, a contract note, headed "Contract for freight and conveyance of live stock." Lower down were the words "Freight, &c., by the 'Emerald Isle' steamer, from Dundalk to Liverpool." In a table at foot the rate of freight was stated to be 4*s.* per head, which was the freight to Liverpool only. Amongst other conditions in the note was the following:—"If live stock . . . are, for the convenience of consignees, booked through, or addressed for any place beyond the port of steamer's destination, this Company shall not be held accountable for any loss or damage to said live stock . . . after being landed on the quay or wharf at aforesaid port." This note was signed by the plaintiff's agent. There was written on the note "G. N. Ry." (being the initials of the defendant Company) "Cambridge." Secondly, a manifest, which was signed by the canvasser of the defendant Company, was headed "Manifest of cattle booked through at Dundalk, for which tickets have been issued at Edge Hill, Liverpool." At Liverpool a ticket was issued by the agents there of the defendant Company to the plaintiff for the carriage of the cattle to Cambridge:—

Held (*a*), that the contract with the Steam Packet Company was to carry

(1) Before PALLES, C.B., and MURPHY, J.

to Liverpool only; but (*b*), as an inference of fact that there was a contract between the defendant Company and the plaintiff, made at Dundalk, for the carriage from Liverpool to Cambridge.

NEW TRIAL MOTION.

The action was brought to recover damages for breach of contract for the carriage and delivery of cattle by railway, and for negligence and breach of duty in and about such carriage and delivery, and for injuries to cattle during such carriage and delivery by the negligence of the defendants' servants, and for loss of market by the plaintiff. The statement of claim averred—1, That the plaintiff was a cattle dealer, carrying on business at Castleblayney, Co. Monaghan; and the defendants were a Railway Company carrying on business as common carriers, and carriers for hire in England, and having agents in Ireland; 2, that on the respective dates set forth in the schedule thereunder the plaintiff delivered to the defendants, as such common carriers, and carriers for hire, at Dundalk, through their agents in that behalf fully authorized, the Dundalk and Newry Steam Packet Company, and the said defendants received, as aforesaid, from the plaintiff upon each occasion the number of store and other cattle, all in prime condition, respectively set forth in the said schedule, to be by them, on each occasion, forwarded and safely, securely, and carefully carried to the respective places of destination therein also set forth, and to be there within a reasonable time in each case delivered in like prime condition to the plaintiff's agents; and all of said cattle were on each occasion booked through direct from Dundalk to their respective destinations, by the said Dundalk and Newry Steam Packet Company, as such agents, and thereupon it became the duty of the defendants to carry and deliver upon each occasion said cattle safely, securely, and carefully, to the plaintiff's agents, at their respective destinations; yet the defendants did not safely, securely, and carefully carry and deliver the same, but during the conveyance of the said cattle by the said defendants upon the said several occasions, the following cattle in the said schedule were either killed or damaged;—of the 36 store cattle in the consignment marked A, 3 were badly injured; of the 82 store cattle in the consignment marked B, 1

Ex. Div. 1893.

CUMMING v. GT. NORTHN. RAILWAY CO.

was killed, and 81 badly injured; of the 63 cattle in the consignment marked C, 4 were badly injured, and 59 damaged, more or less seriously; of the 73 cattle in the consignment marked D, 2 were killed, and 10 badly injured; of the 50 cattle in the consignment marked E, 1 was nearly killed, and 49 damaged, some having ribs broken; of the 71 cattle in the consignment marked F, 3 were badly injured, and of the 60 cattle in the consignment marked G, 4 were badly injured. 3, In the alternative the plaintiff said that in consideration that he would deliver to the defendants, as such common carriers, and carriers for hire, certain cattle in several consignments, on various dates, between the 20th October, 1890, and the 25th November, 1890, to be safely carried to Bury-St-Edmunds, Norwich, and Cambridge, respectively, and there safely delivered for the plaintiff and forwarded by the defendants, the defendants promised the plaintiff to carry safely the said several consignments to the said destinations respectively, and there safely deliver the same for him, and he by his servants and agents delivered the said cattle to the defendants for the purposes, and on the terms aforesaid, and all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiff to have the said cattle carried and delivered, yet the defendants did not safely carry and safely deliver the said cattle for him, but suffered the same to receive injuries, some being killed and others seriously injured, whereby the plaintiff suffered loss and damage. 4, That the said deaths and injuries were caused by the gross negligence, carelessness, and breach of duty of the defendants, their servants and agents, in and about the carriage of said cattle under said contract. 5, In the alternative the plaintiff included the averments, 1, 2, 3, hereinbefore, and said that the death of some, and serious injuries sustained by others of said cattle, in the manner and on the occasions alleged, were in every such case caused by the negligence, carelessness, and breach of duty of the defendants, in and about the carriage of said cattle under said contract; and 6, the plaintiff charged that by the acts of the defendants as aforesaid, the said cattle were deteriorated in value, and the plaintiff was unable to dispose of some from the consequent unfitness for sale of said cattle at the times when and places where same should respectively

have been delivered, and the plaintiff suffered considerable loss and damage therefrom.

The plaintiff claimed £223.

The defendants delivered their statement of defence, and thereby traversed all the averments in the statement of claim, and further pleaded as follows:—(1) Admitting for the purposes of this defence, but not otherwise, that the said cattle were delivered by the plaintiff to the defendants, and were received by them to be carried to the places mentioned, the defendants said that the injuries complained of were not, nor was any of them, occasioned by any neglect or default of the defendants or their servants, and that it was a condition of each of the contracts of carriage, "That when the charge of conveyance is per wagon, as the owner or his servant is required to superintend the loading of the stock, and is allowed to place as many animals in each wagon as he considers may be conveyed with safety, they, the defendants, will not be responsible for loss arising in any way from the overcrowding of such wagons, or for injuries in the loading or unloading thereof, or in consequence of one animal injuring another"; and the defendants said the charge of conveyance in each case was per wagon, and the injuries complained of in each case arose and were occasioned by the overcrowding of the wagons, or were injuries done in the loading or unloading thereof, or in consequence of one animal injuring another, without any neglect or default whatsoever on the part of the defendants or their servants; and (2) pleaded contributory negligence on the part of the plaintiff.

The plaintiff delivered his reply joining issue.

The action was tried before Mr. Justice Gibson and a jury of the city of Dublin, in the Michaelmas Sittings, 1892. The plaintiff was examined, and proved that he was a farmer and cattle dealer living at Castleblayney, county Monaghan, and for four or five years was in the habit of dealing with the defendants, and making large consignments of cattle to England. He knew James Shiels, and saw him at fairs. Plaintiff bought 73 head of cattle, marked lot D in the statement of claim mentioned, at Keady fair, and sent them from Dundalk to Cambridge. No one went with them. They were worth £11 each. They were killed.

Ex. Div. 1893. CUMMING *v.* GT. NORTHN. RAILWAY CO.

[Manifest, dated 8th November, 1890, and signed J. Shiels, entered (1).] He bought 71 head of cattle, lot F, at Ballybay fair. Forty cost £6 each, and thirty-one cost £11 10*s.*, each. [Manifest, signed J. Shiels, entered.] He also bought 60 head of cattle, lot G, at Glasslough fair, at £7 or £8 each. [Manifest dated 22nd November, 1890, signed J. Shiels, entered.] Hamilton was plaintiff's agent, and was paid by commission. The amounts of freight were paid by plaintiff.

Hamilton was examined and proved that he acted as agent for the plaintiff. Of lot D, two of the cattle were dead, and 10 badly injured. £10 each was the value of the dead cattle; and the value of the others injured was £5 each. Of lot F, 3 were hurt by their shoulders being injured, or ribs broken; and were injured to the extent of £4 each. Of lot G, 4 were in bad order, and were injured to the extent of £4 each. Witness further deposed that on receipt of the cattle at Liverpool the receiving Company take note of any apparent injuries. He paid the freight for the entire journey, including the sea journey.

James Shiels was examined, and deposed that he was sub-agent for Messrs. Wallis & Son; and was in the habit of attending fairs, and soliciting all the orders he could get for the defendant Companies. He did not act for the Steamship Company. He was paid a commission of 3*d.* per head. He met and canvassed the plaintiff; and he (witness) signed the manifests in Dundalk in the Booking Office of the Steamship Company in the ordinary course of his duty. In that office there are forms for each Company. He was paid yearly and half-yearly settlements by Messrs. Wallis. On cross-examination the witness deposed that he considered himself employed by the defendants, but never got money from them direct. Four manifests were signed by him to pay at Dublin. The receipts and amount payable were sent to him. The cattle are booked with the Steamship Company, and then he signed manifests when required. The plaintiff's case then closed.

Counsel for the defendants then applied to His Lordship to direct a verdict for them on the following grounds:—1, that there

(1) The several manifests, which were all in the same form, will be found stated in the judgment of the Lord Chief Baron, *infra*, at p. 218.

was a through contract with the Steamship Company, and no contract with the defendants; 2, that there was no evidence of agency on behalf of the defendants; 3, that there was no evidence of negligence. Counsel for the defendants submitted that on the pleadings there must be a direction, and called attention to an affidavit filed on behalf of the plaintiff, as to the contract being in Ireland; and objected to any amendment, which would let the plaintiff rely on a contract, or cause of action, out of the jurisdiction.

His Lordship declined to direct.

On behalf of the defendants the manager of the Manchester, Sheffield, and Lincolnshire Railway was examined, and deposed that that railway was a separate railway, but the Company had a working agreement with the Great Northern Company. The Great Northern and Cheshire Company own the line of railway. The witness deposed "that from Liverpool to Godley Junction is forty-four miles. The junction is four miles beyond Stockport; then we carry to Retford, which is on the Great Northern. From Godley to Retford on our line would be fifty-eight miles, then on Great Northern to Sleaford is forty miles. Sleaford to Bury on Great Eastern is probably more. Going to Norwich the Great Eastern distance is over 100 miles. The junction on the Great Eastern is Sleaford. The railway from Cambridge to Retford is the Great Northern. Neither of the defendants have any agreement with the Dundalk and Newry Steamship Company. They are not our agents in Ireland." On cross-examination the witness deposed that the defendants work under a joint agreement. The manifests were sent in a book in blank to the Steamship Company. The manifests facilitate traffic, and are only advices; they do not show freight. The freight is apportioned at the Clearing House. Messrs. Wallis & Co. are the Company's agents. Messrs. Wallis are responsible for the freight. If they do not get it the loss is theirs: they settle all claims. They are paid by commission: they look out for and get business for the Company. Shiels is not employed by the Company. In the ordinary course cattle are packed by the Cheshire Lines Railway in trucks in Liverpool, at Huskisson, and sent without charge to destination, unless re-loading is necessary. Neither of the defendant Companies had

Ex. Div. 1893.

CUMMING v. GT. NORTHN. RAILWAY CO.

employés at Liverpool. [Several guards' reports were given in evidence, and the defendants' case closed.]

Counsel for the plaintiff applied for a direction. His Lordship declined to direct; and left the following questions to the jury, as appears by the Registrar's certificate:—

1. Were the Steamship Company agents for the defendants for the purpose of making a contract? Answer, "Yes."

2. Were Wallis & Co., by Shiels, agents for the defendants for the like purpose? "Yes."

3. Was there a contract made in Ireland for the carriage of the cattle over the defendants' railways? "Yes."

4. Were the cattle damaged while being carried over the defendants' railways? "Yes."

5. Did the defendants receive the cattle as common carriers? "Yes."

6. Was it by reason of the want of reasonable care on the defendants' part that the cattle were damaged? "Yes."

7. To what damages, if any, is the plaintiff entitled? "Lot D, £62; lot F, £12; lot G, £16. Total, £90."

And the plaintiff, having at the trial abandoned his claim in so far as same relates to lots A, B, C, and E, in the said claim mentioned, the jury found for the defendants with respect to these lots. The Judge directed that judgment should be entered for the plaintiff for the said sum of £90 damages as aforesaid, and costs.

Wright, Q.C., Carson, Q.C., and *Meredith, Q.C.* (with them *A. C. Meredith*), for the defendants, moved to set aside the verdict and judgment, and to have a verdict and judgment entered for the defendants, or for a new trial.

O'Shaughnessy, Q.C., and *Campbell, Q.C.* (with them *Littledale*), for the plaintiff.

Cur. adv. vult.

Jan. 29.

PALLES, C.B.:—

The defendants are carriers of cattle from Liverpool to Cambridge by a line of railway over part of which, from Liverpool to Godley

Junction, they have statutory running powers, and of the rest of which, from Godley Junction to Cambridge, they are the owners. There is evidence that at Liverpool cattle of the plaintiff were received by the defendants, to be carried by them to Cambridge, and that some of them were, during the journey, injured through the negligence of the defendants. *Foulkes* v. *Metropolitan District Railway Company* (1) is an authority that, under such circumstances, the defendants would be responsible to the plaintiff for such injuries, even though the contract for carriage were not made with the defendants. This cause of action, however, is one which arose in England, and in respect of which this Court had not power to order service of the writ out of the jurisdiction; and consequently it has not been included in either writ or statement of claim. The claim is rightly confined to causes of action in contract, and the sole question which has been argued is whether the plaintiff is entitled to judgment upon a cause of action for breach of a contract entered into between him and the defendants in Ireland. If he be, having regard to the reservation at the trial as to amendment, it is immaterial whether that contract has been alleged with strict accuracy in the statement of claim.

I am of opinion that there was evidence of a contract between the plaintiff and the defendants, through their agent Shiels, at Dundalk, for the carriage of the cattle by the defendants from Liverpool to Cambridge; and that, having regard to the course of the trial, although that is not the exact contract which has been found by the jury, we are bound, from the facts admitted at the trial, to infer it as a fact, and that therefore the judgment for the plaintiff should, subject to an amendment of the pleadings, be allowed to stand.

As my decision is based upon the facts of the particular case, and as I think the error of the defendants' contention is the assumption that such facts are identical with those upon which the decisions mainly relied upon were founded, I shall, in the first place, refer in detail to such of those facts as I deem material.

There are three separate railway lines by which cattle can be carried from Liverpool to Cambridge, viz.:—1, the defendants'

(1) 5 C. P. D. 157.

Ex. Div. 1893.

CUMMING v. GT. NORTHN. RAILWAY CO.

Palles, C.B.

line; 2, the Midland; and, 3, the London and North-Western. The Dundalk and Newry Steam Packet Company carry from Dundalk to Liverpool cattle intended to be carried to Cambridge by any of those three lines. The Steam Packet Company have no actual traffic agreement with the defendants; but the defendant Company, as well as the Midland and the London & North Western, send to the Steam Packet Company a book of blank manifests, in a form to which I shall afterwards refer. The particular route from Liverpool to Cambridge is usually—and was in this case—selected, not by the Steam Packet Company, but by the shipper, and each Railway Company employs canvassers to induce shippers to select its particular route. When the route from Liverpool is selected, one of the blank manifests of the selected Company is filled up in the office of the Steam Packet Company, with the particulars of the cattle to be carried. In many cases the amount of the carriage to the ultimate destination in England is not paid at Dundalk, and in such cases the defendants look to their agent, one Wallis, for payment. He employs a sub-agent, Shiels, to canvass for the Company; and when a shipper agrees with Shiels that his cattle are to be carried over the defendants' line from Liverpool, Shiels indicates the fact by signing the manifest in which such cattle are entered.

In relation to each of the consignments upon which the verdict was found, two documents were signed. One was the contract note between the Steam Packet Company and the plaintiff: this was signed by Quigley, the plaintiff's agent. The second document was the manifest which was signed by Shiels. The first, which (although not so found by the jury), may be assumed to contain the terms of carriage as between the Steam Packet Company and the plaintiff, is headed "Contract for Freight and Conveyance of live stock"; and lower down occur the words, "Freight, &c., by the Emerald Isle steamer from Dundalk *to Liverpool.*" These two portions of the document *prima facie* indicate that the conveyance under the special contract is to terminate at Liverpool. Then, in a table at foot, the rate of freight is stated to be 4*s.* per head; and it is admitted, as indeed from the previous part of the note might be assumed, that this 4*s.* per head is the *freight to Liverpool only.* The printed conditions in the note contain, *inter*

alia, the following :—"If live stock . . . are, for the convenience of consignees, booked through, or *addressed for*, any place beyond the port of steamer's destination, this Company shall not be held accountable for any loss or damage to said live stock . . . or for any delay in their transmission or delivery, or be in any respect liable for whatever may happen them *after being landed on the quay* or wharf at aforesaid port."

In the face of these provisions, it would require strong words in the document to justify us in treating it, as the defendants ask us to do, as a contract to carry not to Liverpool, but to Cambridge. The words relied upon to induce us to do so are—1, "that the Company are not to be responsible for loss of any kind by *railways* or any other cause"; 2, the provision I have already read as to non-liability in the event of through-booking; and, 3, the words written into the note, "G. N. Railway, Cambridge."

Of these three matters, by far the most important is the last; and I am far from saying that if the freight mentioned in the document covered the entire journey, or, perhaps, even if it did not contain any statement as to freight, there might not be a contract to carry to Cambridge, notwithstanding the printed provisions. It is often necessary to hold that written words prevail over inconsistent printed matter. In the present instance, however, there is no inconsistency between the various provisions of the note. The conditions contemplate cattle being carried beyond the steamer's destination, either—(1) by being through-booked, by which I understand being contracted to be carried at one rate (indivisible as between the shipper and the carriers) for the entire route to the ultimate destination; or (2) by being contracted to be carried only to the steamer's port of destination, although addressed to, and intended to be ultimately carried to a place beyond it. The distinction between the two cases is that the carriage from Liverpool to the ultimate destination (Cambridge) in the first case would be, and in the second case would not be, under the original contract with the Steam Packet Company. In the present case every clause in the note is consistent with the interpretation that the contract was to carry the cattle to Liverpool only, although addressed to Cambridge; and that the letters "G. N. Ry. Cambridge" are no more than a direction by the

Ex. Div. 1893.

CUMMING v. GT. NORTHN. RAILWAY CO.

Palles, C.B.

plaintiff to the Steam Packet Company to deliver the cattle, in Liverpool, at the place and in the mode in which they usually deliver such cattle as are intended to be forwarded to Cambridge by the Great Northern Railway. Thus read, these words exclude a contract by the Steam Packet Company to carry to Cambridge; and any other construction would be inconsistent with the freight payable under it being the price of the carriage for part of the journey only.

I attach but little importance to the provision as to non-liability for delay or loss by railway. The words are general, are contained in a drag-net clause, and are followed by the even more general words, "or any other cause."

I now come to the second document, the manifest, which was signed by Shiels at Dundalk. It is headed, "manifest of cattle *booked through at Dundalk*, for which tickets *have been* issued at Edge Hill, Liverpool." This document unquestionably is not a contract; and upon the question important here, viz. whether the contract of the defendants was with the Steam Packet Company or with the plaintiff, it affords no information whatsoever. It seems to have been prepared for the instruction of the servants at Liverpool, and subsequent stations, and to be a direction to them to make preparations there for the carriage of the expected cattle. The cattle had not in fact been booked through; through tickets had not been issued for them; but the defendants being informed by Shiels' signature on the manifest signed by Shiels, that they are to be carried by their line, direct their servants to make preparations for them as if they had been booked through, and accordingly we find that the Great Northern Railway carriages were ready for them at Liverpool, and that the Cheshire Lines Committee, as the defendants' agents at Liverpool, issue a ticket for them in the form of a through ticket. This ticket, no doubt, includes in the price of the carriage the Steam Packet Company's freight, but this act of the defendants could not impose upon the Steam Packet Company a liability greater than that which they contracted to bear. The ticket, however, is material in this, that it shows a direct privity between the defendants, through their then agents, the Cheshire Lines Committee, and the plaintiff. The ticket is issued to him, not to the Steam Packet Company.

Upon the whole, then, it seems to me to be plain that the contract under which the cattle were carried from Liverpool, to Cambridge was not that entered into between the Steam Packet Company and the plaintiff, but one between the defendants and the plaintiff; and thus the only matter remaining for consideration is the place where that contract was entered into.

As to this there is evidence:—1, that at Dundalk the plaintiff, at Shiel's request, agreed with him, as the defendants' agent, that the cattle should be sent from Liverpool by the defendants' line; 2, that, at Dundalk, Shiels, as the defendants' agent, agreed with the plaintiff that the defendants should carry the cattle by that line; 3, that Shiels, acting for Wallis, was entitled to assume, as against the defendants, that the cattle in respect of which he signed the manifest would be forwarded by the defendants, and that therefore he had power to bind the defendants by a contract that they would be so forwarded. These three matters amount to a contract by the defendants with the plaintiff at Dundalk; and show that the ticket given at Liverpool was not the contract, but was issued in pursuance of the previous contract.

In result, then, I am of opinion—1, as matter of law, that the contract with the Steam Packet Company was to carry to Liverpool only; and, 2, as an inference of fact, that there was a contract between the defendants and the plaintiff, made at Dundalk, for the carriage from Liverpool to Cambridge.

It is said that this conclusion is contrary to *The Bristol and Exeter Railway Company* v. *Collins* (1) which I take as being the type of all the cases cited. I conceive that it is not. Indeed I believe that, when properly considered, that decision is an affirmative authority in support of my view. It decided two matters:—1, that the special contract made by the Great Western Railway at Bath was one to carry from Bath to Torquay, and not to Bristol only, where the booking company's line terminated; 2, that, *upon that assumption*, there was no contract by implication between the Bristol and Exeter Company and the plaintiff to carry from Bristol to Exeter. The decision upon the second point was matter of law, and is of course a conclusive

(1) 7 H. L. Cas. 194.

Ex. Div. 1893.

CUMMING v. GT. NORTHN. RAILWAY CO.

Palles, C.B.

authority, upon the question decided; but, as such authority, it has no application to the present case, if I be right in having held that the carriage contracted for by the Steam Packet Company was to carry to Liverpool only. The decision upon the first question depended so entirely upon documents and facts in evidence, which are different from those in the present case, as to render the decision upon that first question also inapplicable here. This is so, whether the decision is to be treated as one depending—as Lord Kingsdown was of opinion it did—upon the construction of the document as matter of law, or upon the question of fact of the nature of the contract, which Lord Chelmsford and Lord Cranworth thought was to be gathered from all the circumstances of the case. The mode in which the authority of that case has been pressed upon us forcibly recalls the observation of Lord Halsbury, in *The Joint Stock Bank* v. *Simmons* (1) in reference to the previous decision of the House of Lords in *The Earl of Sheffield* v. *London Joint Stock Bank* (2). "If," says the Lord Chancellor, "as I believe, it be accurate, that the question is one to be determined upon the facts of the case, no one case can be an authority for another." I accordingly preface my remarks upon *Collins' Case* (3), as did Lord Halsbury his upon *Lord Sheffield's Case* (2), with the protest "that it is not a very profitable inquiry to consider whether one case resembles another in its facts." The elements relied upon in *Collins' Case* (3), as evidencing a contract by the booking company to carry to the ultimate destination, were two: 1 that there was one entire and indivisible charge for the entire journey, not only paid, but *contracted for* and paid as "the Company's charges"; 2, that the direction that the goods were "to be sent to Torquay, and delivered to R. C. Collins," was unqualified by any condition negativing the liability of the Company for carriage beyond their own line. The main parts of the judgments of the Judges and law lords are occupied by the consideration of the tenth condition, which would, if applicable, have qualified the liability of the Great Western Company, and in the view there taken have led to a decision against the Company. The House of Lords, however, ultimately held that this condition

(1) [1892] App. Cas. 208. (2) 13 App. Cas. 333. (3) 7 H. L. Cas. 194.

on its true construction, was not applicable to the case before them, and based their judgment upon the construction of the condition, and on the one indivisible charge for carriage. In the present case, on the contrary, there is a condition clearly negativing liability, after the goods are landed on the quay at Liverpool; and although but one charge was paid, part only of it was contracted for by the booking company, and that part was for the carriage over a distinct part only of the journey.

Every judgment in favour of the defendants in *Collins' Case* (1) consists solely of arguments as to the construction of the condition, and as to the effect of the indivisibility of the charge. I shall refer to a few passages as to the latter. Watson, B., says, p. 206: —"One sum . . . is paid for the whole journey, expressed as 'the Company's charges.' Here there is but one journey from Bath to Torquay, and one charge." He then proceeds to treat the case as similar to *Muschamp's Case* (2), in which there was also but one charge. Martin, B., says, p. 224:—"They make but one charge for the entire journey, which is to be paid by the plaintiff in one sum at the end of the journey at Torquay, and which is stated in express terms to be the charge of the Great Western Railway Company." Lord Chelmsford (in whose opinion Lord Brougham concurred), states, p. 233:—"The whole amount is charged by the Great Western Railway Company for the entire journey from Bath to Torquay, and is styled 'the Company's charges.' Considering that the charges upon the other lines may possibly not be the same as those on the Great Western Railway, this appears to be a strong circumstance to show that the Great Western Railway Company took upon itself the whole duty of conveyance of the goods to Torquay." Lord Cranworth says, p. 235:—"Now, looking at the 'receipt note,' it appears that the whole charge, £9 13*s.* 5*d.*, was received by the Great Western Railway Company under the head of 'the Company's charges.' Considering, then, that the goods were to be taken to Torquay station, that the Company's charges were represented at £9 13*s.* 5*d.*, and that there was no charge except *the Company's charge*, the inference which the consignor would necessarily draw must be that the Company

(1) 7 H. L. Cas. 194. (2) 8 M. & W. 421.

Ex. Div. 1893.

CUMMING v. GT. NORTHN. RAILWAY CO.

Palles, C.B.

would convey the goods to Torquay, for conveyance to which place the Company had charged and accepted one entire sum."

Lord Wensleydale, p. 238, treats the expression in the receipt note, "to be sent to Torquay," as being ambiguous, and consistent either with the Great Western Company carrying all the way, or carrying part of the way, and transmitting the goods to be carried the rest of the way by another railway company, and proceeds thus:—"But it is consistent with the supposition that the Great Western Company was to be responsible for their reaching Torquay, and being there delivered to the plaintiff Collins, or his agents. And the fact that one single undivided charge is to be paid to the Great Western Company for the whole journey is strong to show that that Company was to be so responsible. It is natural to suppose that if it was intended that the Great Western Railway Company was to be responsible for the carriage along its own line only, and to be agent to make another contract with another Company or Companies, for the rest of the transit, on behalf of the consignor, the reward for *that carriage* to be kept by the Great Western Company should be distinctly and *expressly specified*, and not left to form an *undefined part* of the *entire* sum paid down by the consignor." What Lord Wensleydale says ought to have been done, were the booking company to be responsible only for the carriage over their own line, is the identical thing which has been done by the Steam Packet Company in the present case.

The passages which I have read indicate that one of the governing elements in construing the contract with the Great Western Company, as being one for carriage to the ultimate destination, was that the charge for the entire carriage was an indivisible one. If this be the true ground of the decision, it is, as I have already observed, an authority in favour of the plaintiff here, by reason of the charge in the present case being not entire, but divided.

I have but one word to add, and that is upon a matter little more than formal. The contract found by the jury was a contract to carry over the defendants' own line from Godley Junction to Cambridge. This, however, is not inconsistent with the contract having embraced, in addition, the carriage from Liverpool to Godley Junction. We have all the facts before us. Were the

case sent to a second trial, and if the jury failed to find a contract by the defendants to carry from Liverpool to Cambridge, I should have no hesitation in setting aside the verdict; and under our power of drawing inferences of fact, I infer such a contract as a fact. The statement of claim should be amended, by stating a contract by the defendants to carry from Liverpool to Cambridge, and, subject to such amendment, the verdict and judgment must be for the plaintiff.

MURPHY, J., concurred.

"IT is ordered by the Court that the said plaintiff be at liberty to amend the 3rd paragraph of his statement of claim by inserting therein, after the words "to be safely carried," the words "from Liverpool"; and it is further ordered that a verdict be entered for the said plaintiff, with £90 damages upon the causes of action in respect of breaches of contract in the carriage from Liverpool to Cambridge, so far as same relate to lots D, F, and G, and that a verdict be entered for the said defendants upon the residue of the causes of action in the said statement of claim, and that judgment be entered accordingly for the said plaintiff and the said defendants, respectively, with costs of suit; and it is further ordered that the said plaintiff's costs of this motion and argument be part of his costs in the action."

J. P. B.

The defendants appealed to the Court of Appeal.

Wright, *Q.C.*, and *R. E. Meredith*, *Q.C.* (with them *Carson*, *Q.C.*, and *A. C. Meredith*), for the appellants.

O'Shaughnessy, *Q.C.*, *Campbell*, *Q.C.*, and *Littledale*, for the respondent (plaintiff), were not called on.

THE COURT (Walker, C., and FitzGibbon, and Barry, L.JJ.), dismissed the appeal with costs.

Solicitor for the plaintiff: *J. F. Dunwoody.*
Solicitor for the defendants: *J. K. Toomey.*

R. D. M.

Land Com. 1893.

Feb. 11.
March 13.

CHARLES ROBERT HAMILTON, GRANTOR; DANIEL CASEY, GRANTEE (1).

Redemption of Rent (Ireland) Act, 1891 (54 & 55 *Vict. c.* 57), *s.* 1—"*Fee-farm grant*"—*Meaning of*—*Church Temporalities Acts* (3 & 4 *Wm.* 4, *c.* 37; 4 & 5 *Wm.* 4, *c.* 90; 6 & 7 *Wm.* 4, *c.* 99)—*Sub-perpetuity grant.*

A sub-perpetuity grant, made under the Church Temporalities Acts, is a fee-farm grant within the meaning of the Redemption of Rent (Ireland) Act, 1891.

APPEAL from the decision of Mr. Commissioner Mac Carthy, directing the redemption of a perpetual yearly rent of £161 16*s.* 2*d.*, created by a sub-perpetuity grant of June 1st, 1842.

The facts of the case are stated in the judgment of Bewley, J.

F. P. Hamilton, for the grantor (appellant):—

Fee-farm grants in Ireland may be, at common law, as in *Delacherois* v. *Delacherois* (2), or, by statute, as under the Renewable Leasehold Conversion Act, as to the effect of which see *Watson* v. *Watson* (3), or, as here, under the Church Temporalities Acts, as to the effect of which see *Dane's Estate* (4). The nature of these different grants is discussed in Edge on Leases, pp. 189–198. The rent reserved by the sub-perpetuity grant here is in the nature of a rentcharge, and the relation of landlord and tenant does not exist. The case is therefore governed by *Kelly* v. *Rattey* (5), and does not come within the Redemption of Rent Act.

Further, the Church Temporalities Acts provide a variation of the rent according to prices, and therefore the grant is excluded from the operation of the Redemption of Rent Act, and Land Acts of 1881 and 1887.

(1) Before BEWLEY, J., and LYNCH and WRENCH, Commrs.
(2) 11 H. L. Cas. 62.
(3) Ir. R. 11 Eq. 523.
(4) Ir. R. 10 Eq. 207.
(5) 27 I. L. T. R. 29; and see *post*, p. 226, note.

Miles Kehoe, for the grantee (respondent) :—

Land Com. 1893.

HAMILTON, *Grantor*: CASEY, *Grantee.*

The relation of landlord and tenant continues, notwithstanding the sub-perpetuity grant. The remedies given by the Church Temporalities Acts for non-payment of rent, under a grant of this kind are the same as for non-payment of rent service. [He cited *Gun-Cunningham* v. *Byrne* (1), and *Christie* v. *Peacocke* (2).

BEWLEY, J. :—

March 13.

This case came before the Court on cross appeals by the grantor, Mr. C. R. Hamilton, and the grantee, Mr. D. Casey, from an order of the late Mr. Commissioner Mac Carthy, dated the 24th May, 1892, directing the redemption of a perpetual yearly rent of £161 16*s.* 2*d.*, created by a deed dated the 1st June, 1842, and fixing the redemption price at the sum of £3000 guaranteed land stock.

On the part of the landlord it has been urged that the deed referred to is not a fee-farm grant within the meaning of the Redemption of Rent (Ireland) Act, 1891, and that the rent sought to be redeemed is a mere rentcharge. The deed of the 1st June, 1842, is what is commonly called "a sub-perpetuity grant," executed under the provisions of the Church Temporalities Acts. A. Hamilton, who was the surviving trustee of the settlement, executed on the marriage of C. Hamilton with Mary Tighe, had been tenant of the lands of Bishopstown, in the county of Westmeath, with other lands under the See of Meath, by a lease for twenty-one years customarily renewable ; and D. Casey, the elder, father of the present grantee, held part of these lands of Bishopstown under a lease for twenty-one years, with a *toties quoties* covenant for renewal.

By a deed dated the 5th May, 1838, made between the then Lord Bishop of Meath of the first part, the Ecclesiastical Commissioners for Ireland of the second part, and A. Hamilton of the third part, the said Lord Bishop of Meath, under and by virtue of the 3 & 4 Wm. 4, c. 37, granted to A. Hamilton and his heirs the town and lands of Bishopstown, containing of profitable land and bog 901A. 2R. 11P. late Irish plantation measurement, to hold

(1) 30 L. R. Ir. 384. (2) *Ibid.* 646.

Land Com. 1893.

HAMILTON, *Grantor;* CASEY, *Grantee.*

Bewley, J.

unto A. Hamilton, his heirs and assigns for ever, at the yearly rent of £273 13*s.* 5*d.*, or such increased or diminished yearly rent as should from time to time thereafter be substituted in place of the reserved rent under the provisions of the said Act.

By a sub-grant, dated the 1st June, 1822, made between A. Hamilton of the first part, C. Hamilton of the second part, and D. Casey, the elder, of the third part, the said A. Hamilton, with the consent, direction, and appointment of the said C. Hamilton, granted unto D. Casey that part of the lands of Bishopstown aforesaid, containing by a survey then lately made thereof 104A. 2R., excepting and reserving thereout as therein mentioned, to hold the same unto and to the use of D. Casey, his heirs, and assigns, for ever, at the yearly rent of £161 16*s.* 2*d.*, or such increased or diminished yearly rent as should from time to time thereafter be substituted in the place of the said reserved rent, subject as therein mentioned.

The interest of the grantee under this sub-grant is now vested in D. Casey, the younger, and the interest of the grantor in C. R. Hamilton.

As in *Kelly* v. *Rattey* (1), I have recently expressed my views

(1) Since affirmed on appeal: 32 L. R. Ir. 445. The following is the judgment delivered by BEWLEY, J.:—

This case came before us on an application on behalf of William Rattey to set aside the originating notice served by Charles Kelly under the Redemption of Rent (Ireland) Act, 1891, on the ground that the lands referred to in the originating notice do not constitute a holding within the meaning of the Land Law (Ireland) Acts, 1881 and 1887; that Charles Kelly is not a tenant within the meaning of the said Acts; and that the annual sum of £320 sought to be redeemed is not a rent within the meaning of the said Acts.

The rent in respect of which the present proceedings have been instituted was created by a deed dated the 9th February, 1846, made between William Henry Magan of the one part and John Hubert Kelly of the other part, whereby William H. Magan demised and granted to John H. Kelly that part of the lands of Lalistown, otherwise Lunestown and Ushna Hill, containing 211A. 3R. 11P. Irish plantation measure, be the same more or less, together with that part of the bog of Lalistown, containing 18A. 3R. 20P., be the same more or less, both then in the actual possession of the said John Hubert Kelly, together with the dwellinghouse, offices, and premises erected and built thereon, situate in the Barony of Rathconrath and County of Westmeath, excepting and reserving thereout as therein mentioned, to hold the said

Land Com. 1893.

HAMILTON, *Grantor*; CASEY, *Grantee.*

Bewley, J.

on the construction of the Redemption of Rent (Ireland) Act, 1891, I do not consider it necessary now to repeat the reasons which led me to the conclusion that this Act is only applicable to cases in which the relation of landlord and tenant exists.

The question to be considered in the present case is, therefore, Does the relation of landlord and tenant exist between C. R. Hamilton and D. Casey, or is the rent sought to be redeemed only a rentcharge? In considering this question regard must be had not merely to the 6 & 7 Wm. 4, c. 99, under which sub-perpetuity grants are made, but to the prior Church Temporalities Acts of the 3 & 4 Wm. 4, c. 37, and 4 & 5 Wm. 4, c. 90, and to the causes which led to this legislation.

Prior to the passing of these statutes a bishop of the Established Church of Ireland could make a lease to a tenant of See lands for a term of twenty-one years at the old accustomed rent, and in the case of augmentation lands (*i.e.* lands granted to certain bishoprics by the Act of Settlement of Charles II.) for three lives, taking in each case whatever fine he could obtain; and he could do this every year, the new lease operating as a surrender of the old. These leases for twenty-one years were customarily renewable;

demised premises, with the appurtenances, unto the said John Hubert Kelly, his heirs, executors, administrators, and assigns, from the 1st November then last for ever, the said John Hubert Kelly, his heirs, executors, administrators, and assigns, yielding and paying therefor and thereout yearly and every year during the said term unto the said William Henry Magan, his heirs, executors, administrators, and assigns, the yearly rent or sum of £320, payable half-yearly as therein mentioned.

It is not alleged that William H. Magan had any power by statute, patent from the Crown, or otherwise to create a tenure in fee; and consequently the effect of this instrument was to convey the fee-simple of the lands to John Hubert Kelly, subject to the payment to William Henry Magan, his heirs, and assigns, of a perpetual yearly rentcharge of £320.

Does the Redemption of Rent (Ireland) Act, 1891, authorize the redemption of a rentcharge of this nature? [His Lordship read sections 1, 2, and 3.] This Court has held, in *Christie* v. *Peacocke* (1), that a rentcharge in fee, limited by way of use to the grantor in a grant of lands in fee-simple, is not within the operation of this Act; and that decision is sought to be distinguished on the ground that in the present case the parties purported to create the relation of landlord and tenant.

(1) 30 L. R. Ir. 646.

Land Com. 1893.

HAMILTON, *Grantor*; CASEY, *Grantee.*

Bewley, J.

but there was no legal obligation on the bishop to renew, and a young bishop might run his life (as it was expressed) against the existing lease, and when it expired by efflux of time he might let the lands to a trustee for himself, or to any other person at any rent not less than a moiety of the true value. On the other hand, the tenant was under no obligation to renew, and might abstain from renewing for many years, in the hope that when the bishop grew older he might be willing to renew for a less fine than that ordinarily payable. The usual custom, however, was to renew annually, and there grew up an almost uniform method of estimating the annual fine in See lands, namely, in all dioceses except Armagh it was calculated at one-fifth of the profit rent received by the tenant after deducting the rent paid to the bishop, and in Armagh at one-eighth instead of one-fifth.

This system was open to many objections. The tenant had no security of tenure, and after he and his predecessors in title had expended large sums in improvements, he might lose all by the bishop refusing to renew, and by the term coming to an end. On the other hand, there was great uncertainty in episcopal incomes. Tenants frequently omitted to renew for many years, and on the

I do not think the decision in the present case depends on any abstruse or technical considerations, nor, in my opinion, can any substantial assistance be derived from the judgments in *Verschoyle* v. *Perkins* (1) or *Delacherois* v. *Delacherois* (2). A fee-farm grant at Common Law is a grant in fee-simple made by a mesne lord, subject to a perpetual rent service. Mr. Hargrave's note to Coke Litt. 143*b*, in my opinion, states the law correctly on this point, and if further authority were wanting, Britton 164*b*; 2 Coke Inst. 44; 4 Jarman's Conveyancing by Sweet, 3rd Ed. 325, may be referred to. Mr. Douglas, no doubt, in his note to *Bradbury* v. *Wright* (3) expressed an opinion that a fee-farm rent might include a rentcharge reserved on a grant in fee; but Mr. Hargrave, on consideration, adhered to his original view. Blackstone, vol. II. p. 43, defined a fee-farm rent as a rentcharge issuing out of an estate in fee, of at least one-fourth of the value of the lands, but he evidently misconceived Lord Coke's meaning. In England sub-infeudation was entirely abolished by the statute *Quia Emptores*, and, consequently, whenever at the present day a freehold tenant in fee-simple holds of a mesne lord at a rent, his title must date from a period anterior to the 18th year of Edward I. Owing probably to the comparative rarity of fee-farm grants in England, there has been some laxity in the use of the expression "fee-farm rent" in modern

(1) 13 Ir. Eq. R. 72. (2) 11 H. L. Cas. 62. (3) Doug. 602.

Land Com. 1893.

HAMILTON, *Grantor*; CASEY, *Grantee*.

Bewley, J.

death of a bishop his successor for the time being was entitled to receive the whole amount of fines paid for renewal, even though a large proportion of them, if the leases had been renewed annually, would have been payable to the previous bishop.

The object of the 3 & 4 Wm. 4, c. 37, so far as it related to these leaseholds was to enable all tenants holding immediately from bishops or other ecclesiastical corporations sole in Ireland, or from the Ecclesiastical Commissioners for terms of twenty-one years, or of three lives, to purchase a conveyance of a perpetual estate in their lands subject to a fee-farm rent. The rent was to be ascertained by adding together the rent payable under the lease and the average renewal fine; and this rent was subject to variation with the average price of wheat or oats: a standard price of either grain (whichever of the two should be most grown in the district where the lands were situate) being stated in the conveyance.

The provisions of this Act, to which I shall briefly refer, appear to me to show an intention that the rent to be reserved should be in the nature of a rent-service and not a rentcharge; and that the existing relation of landlord and tenant should be

times, and in some recent statutes it is used in such a manner as to include a rentcharge in fee.

The statute *Quia Emptores* was introduced into Ireland, in 1495, by the operation of Poyning's Act, 10 Hen. 7, c. 22, but, as I pointed out in *Christie* v. *Peacocke* (1), under legislation peculiar to Ireland, and by virtue of various grants from the Crown, a number of valid fee-farm grants in the strictest sense have, from time to time, been made in this country since the statute *Quia Emptores* became law.

In 1850 the Renewable Leasehold Conversion Act, 12 & 13 Vict. c. 105, was passed. That was an Act, as its title declares, "for converting the renewable leasehold tenure of lands in Ireland into a tenure in fee," and whatever differences of opinion there may be as to the mode in which the Act operates, I think it is sufficiently plain that it was the intention of the Legislature that the leasehold tenure which, prior to the execution of a fee-farm grant, existed between landlord and tenant, should be converted into a tenure in fee between the same parties, subject to a perpetual rent. I do not propose now to discuss the views expressed by Baron Fitz Gerald in *Morris* v. *Morris* (2) as to the *modus operandi* of a fee-farm grant executed under this Act, namely, that the grant by virtue of the Common Law creates a rentcharge, and that this, by the operation

(1) 30 L. R. Ir. 646. (2) Ir. R. 7 C. L. 311.

Land Com. 1893.

HAMILTON, *Grantor*; CASEY, *Grantee.*

Bewley, J.

preserved or a new statutory relation of landlord and tenant created.

Section 128 provides as follows:—"It shall and may be lawful for any tenant or tenants, lessee or lessees, holding or who shall hold under or by virtue of any lease or contract, for term of twenty-one years, or for term of twenty-one years or three lives, or for three lives, or for term of forty years, immediately from and under any archbishop or bishop, or other sole ecclesiastical corporation in Ireland, any lands, premises, or hereditaments belonging to the respective sees or other spiritual promotion or dignity of any such archbishop or bishop, or other sole ecclesiastical corporation, to purchase the fee-simple and inheritance of and in the said lands, premises and hereditaments so held by him or them, as aforesaid, in the manner and at the rate of purchase-money, or subject to the perpetual annual rents, and to the provisoes, restrictions, regulations, and conditions hereinafter mentioned; (that is to say,) it shall and may be lawful for any such tenant or lessee, by notice in writing under his hand, to notify to the said Commissioners under this Act, and to such archbishop or bishop, or other ecclesiastical person under whom

of the statute, is converted into a rent-service. It is enough to say that, in my opinion, either the original relation of landlord and tenant is in such a case preserved, or a new statutory relation of landlord and tenant created, and that the fee-farm rent is either a rent-service, properly so called, or a rent in the nature of a rent-service. The provisions of the 20th section do not necessarily imply that the fee-farm rent is not a rent-service. I refer to this Act because it was strongly insisted by counsel for the grantee in this case, that if the rent-charge payable by Charles Kelly was outside the benefits of the Redemption of Rent Act, a fee-farm rent under a grant executed pursuant to the provisions of the Renewable Leasehold Conversion Act, must also necessarily be excluded. In my opinion there is a very marked difference between the two cases. In the present case the relation of landlord and tenant does not exist between the parties, and never has existed, while in the case of a fee-farm grant under the Renewable Leasehold Conversion Act, the relation, in my opinion, is maintained. The Act 14 & 15 Vict c. 20, referred to so frequently in the arguments, extended the remedies (other than ejectment for non-payment of rent) provided by the Renewable Leasehold Conversion Act for the recovery of fee-farm rents made payable by grants under the provisions of that Act to all fee-farm rents, and also to other rents reserved and made payable under any grants, conveyances, or written instruments granting or containing agreements for

such lands, premises, or hereditaments are or shall be held, that he, such tenant or lessee, is ready and willing to purchase the fee-simple and inheritance as aforesaid of and in the said lands, premises, or hereditaments, so held by him under such archbishopric or bishopric, or other spiritual promotion or dignity, in the manner and pursuant to the provisions of this Act; and that thereupon the said Commissioners shall and may, and they are hereby authorized and required to, ascertain the annual rent or rents now thereby reserved and payable by virtue of such lease or contract out of the said lands and premises, and the amount of the sum or sums of money theretofore paid or agreed to be paid as and for the fine or fines and fees for the renewal of any such lease or interest of and in the said lands and premises, in the case of leases usually renewed every or every alternate or every third year, for and during the period of nine years next preceding the service of such notice; and in case of leases usually renewed at longer intervals, and in the case of leases for lives, for and during such period as shall include the three last previous occasions of such renewal; and every such archbishop or bishop or other ecclesiastical person under whom the said lands and premises shall be held as aforesaid shall, upon being

granting any lands, tenements, or hereditaments, in fee-simple, or for a life or lives, or for years, or for a life or lives and a term of years, or for a life or lives concurrent with a term of years, and reserving, or purporting to reserve thereout, rent payable to the grantor, or party agreeing to make such grant, or to his or their respective representatives, where the person to whom such rent is, or shall be payable, has, or shall have, no reversion in such land. This Act applies not only to such a grant as that in the present case, but also to those instruments in the form of leases, frequently met with where a party holding himself under a lease for a life or lives, or for years, purports to make a sub-lease for the entire of his own term. In such cases, as is well settled, the instrument purporting to be a sub-lease, if executed prior to the 1st Jan., 1861, operated in law as an assignment; the person intended to be made a sub-lessee became direct tenant to the head landlord; and the rent reserved was a rentcharge, and not a rent-service. I may notice that in this statute a distinction is apparently made between "fee-farm rents" and "other rents reserved and payable under grants in fee-simple," and that the expression "fee-farm rent" appears to be used in its technical sense—*i.e.* the rent payable under a fee-farm grant at Common Law.

The Landlord and Tenant Law Amendment Act (Ireland) 1860 (commonly known as Deasy's Act), by its 3rd section, put the relation of landlord and

Land Com. 1893.

HAMILTON, *Grantor;* CASEY, *Grantee.*

Bewley, J.

thereto required by the said Commissioners by writing, certify to the said Commissioners, by writing under his hand and seal, the amount of such annual rent, and every such fine or fines and fees so paid, or agreed to be paid, or usually paid or payable as aforesaid, for and during such period as aforesaid; and it shall and may be lawful for the said Commissioners under this Act, and they are hereby empowered, if they shall so think fit, or shall be required by requisition under the hand and seal of the said archbishop or bishop, or other ecclesiastical person, or tenant or tenants, lessee or lessees, to issue a commission under their seal to inquire into and ascertain the amount of such annual rent and such renewal fine or fines as aforesaid so paid or payable, or agreed to be paid, or usually paid or payable as aforesaid, for and during the period aforesaid."

Section 130 provides that the Commissioners shall estimate the average of renewal fines, and that such average, together with and in addition to "the rent or rents theretofore reserved," shall be the amount of "the rent to be hereafter reserved." The language of this section does not suggest any difference in the nature or quality of these rents.

Section 131 refers to the amount of annual rent to be reserved

tenant in Ireland on the basis of contract in lieu of that of tenure, and a grant in fee reserving a perpetual rent, executed since the passing of the Act, creates the relation of landlord and tenant; but as this 3rd section is not retrospective, the position of the parties deriving under William Henry Magan, the grantor, and J. H. Kelly the grantee, in the deed of the 9th February, 1846, is not affected by this statute: *Chute* v. *Busteed* (1). William Rattey is not a landlord, and Charles Kelly is tenant only to the Crown.

In considering the construction of the Redemption of Rent Act, it is to be borne in mind that it is "to be read and construed with the Land Law (Ireland) Acts, 1881 and 1887, and the Land Purchase Acts." The Redemption of Rent Act deals with two subject-matters—1, purchase; and 2, fixing a fair rent; and if we turn to the provisions of the statutes with which it is to be read and construed relating to these subject-matters, we find that they are applicable only to persons standing to one another in the relation of landlord and tenant.

"Holding" is defined by the 57th section of the Land Act of 1881, as meaning "during the continuance of a tenancy, a parcel of land held by a tenant of a landlord, for the same term, and under the same contract of tenancy, and upon the determination of such tenancy the same parcel of land discharged from the tenancy." "Contract of tenancy" means " letting or agreement

(1) 16 Ir. C. L. R. 222.

and made payable "in and by the deed of *conveyance or demise* hereinafter mentioned"; these words occur in two places.

Section 133 provides for notice to the parties of the amount of the rent to be thereafter reserved, together with the purchase-money, "to be paid for the *conveyance or demise* of the said lands": the expression "demise" being only applicable where the relation of landlord and tenant is created.

Section 136 deals with the execution of the deed of conveyance; sect. 142 provides for the revision of the rent; sect. 146 is important; it deals with the remedy for recovery of the reserved rent; it provides that the rent shall be recovered by all the means provided for the recovery of any rent-service upon any lease for life or for years executed by any landlord; and if ejectment is brought for non-payment of any such annual rent, and the lands are evicted, and the tenant, lessee, or grantee, does not redeem within six months, it provides that an under tenant or owner of any derivative interest, who contributed to the purchase, may redeem within nine months, as a mortgagee might under the ejectment statutes.

Section 149 provides that where the tenant having acquired the fee-simple is bound by covenant to renew to inferior tenants,

for the letting of land for a term of years or lives, or for lives and years, or from year to year." "Tenant" means "a person occupying lands under a contract of tenancy, and includes the successors in title to a tenant." And "landlord" means "the immediate landlord, or the person for the time being entitled to receive the rents and profits, or take possession of the land held by his tenant, and includes the successors in title to a landlord." "Contract of tenancy," as defined by this Act, did not include a fee-farm grant, and consequently a person entitled to the grantee's interest under a fee-farm grant could not claim the benefits of the fair rent or purchase clauses of the Act. The Purchase of Land (Ireland) Act, 1885 (commonly called the Ashbourne Act), amended the provisions of Part v. of the Land Act of 1881, dealing with the acquisition of lands by tenants, and introduced more favourable provisions "for enabling tenants to purchase their holdings," and, as it was considered just that the grantee under a fee-farm grant should have the same privileges with respect to purchase as other tenants, it was provided by section 26 that "The expression 'tenant' shall include a tenant holding under a fee-farm grant."

The Land Act of 1887, by its first section, enlarged the class of lessees entitled to have a fair rent fixed under the Act of 1881, by extending the description of leases within that section to those expiring within 99 years instead

Land Com. 1893.

HAMILTON, *Grantor*; CASEY, *Grantee.*

Bewley, J.

the conveyance to him in fee shall as to such inferior tenants operate as a renewal from time to time; and sect. 150 deals with the mode of ascertaining the renewal fines of inferior tenants.

Section 152 provides that "whenever any such tenant shall have purchased the fee-simple of the lands held by him, and shall be bound to renew any lease or leases to any *under or inferior tenant*, or any other person or persons, all and every such person and persons having any derivative estate or interest in the said lands immediately or mediately from, through, or under such immediate superior tenant, who shall have made such purchase as aforesaid, shall respectively contribute towards the amount of the purchase-money thereof, according to the value of their respective interests in manner following"; and then the manner is prescribed. I refer to this section as showing that a grantee under a perpetuity grant is still spoken of as a "tenant," or "immediate superior tenant."

Section 153, which provides that a petition may be presented to the Court of Chancery to settle disputes as to the amount of purchase-money to be contributed, in the last clause enacts that "it shall and may be lawful for any such immediate superior

of 60 years from the passing of the Act of 1881, and entitled the lessees coming within this extended class to apply *in præsenti* instead of waiting for the expiration of their leases: *Barton* v. *Atkinson* (1); and the object of the Redemption of Rent Act of 1891 was, in my opinion, to still further enlarge the class of tenants entitled to have a fair rent fixed, but to give the landlord the option of having the rent bought up under the Land Purchase Acts with moneys wholly or partially advanced by the State, in lieu of having a judicial rent fixed. But no intention is shown by the Act, so far as I can discover, to extend the benefits of the fair rent provisions or purchase provisions of the prior Land Acts to cases in which the relation of landlord and tenant did not subsist. The person making an application under the Act must be in occupation of a holding to which Part I. of the Land Act of 1881 applies, that is in substance a parcel of land held by a tenant of a landlord which, but for the length of the term or nature of the estate, would otherwise come within the 1st section of the Land Act of 1887. He must hold his land at a rent which the Land Commission considers to be a full agricultural rent; and, if the lessor or grantor fails to give the requisite consent to the redemption, the applicant will be deemed to have made the prescribed application under section 1 of the Act of 1887, and will be held to be a tenant of a present tenancy in manner and subject to the

(1) 30 L. R. Ir. 396.

tenant" (*i.e.* any person who has got a perpetuity grant) "to make all the tenants or persons having or claiming any derivative interest in the said lands, whether immediately or mediately, from, through, or under him, parties to any such petition."

Section 159 contains a definition of the words "landlord" and "tenant." So far for 3 & 4 Wm. 4, c. 37.

4 & 5 Wm. 4, c. 90, section 30, was passed to enable sub-tenants to purchase perpetuities in bishops' lands in default of superior tenants applying for a grant, such grant to the sub-tenant to be subject to a rent payable to the bishop, and to a rentcharge to the superior tenant; thus drawing a marked distinction between "rent" and "rentcharge." Sect. 31 deals with the mode of ascertaining this rentcharge, and sect. 35 provides for the apportionment of the "annual rentcharge to be reserved to the intervening tenant."

6 & 7 Wm. 4, c. 99, sect. 1, empowered an inferior tenant to apply to his immediate landlord, who had acquired a perpetuity, for a conveyance of a perpetual estate or interest. Sect. 2 deals with the ascertainment of the rent to be reserved on such a conveyance. Sect. 5 provides that such rent is to be subject to variation, as

conditions and right of resumption mentioned in section 21 of the Act of 1881, as modified by the Act of 1887, and his holding will be subject to the provisions of these Acts with regard to present tenancies. In the present case, as no consent has been given, these latter provisions will apply if the case is within the Act. The right of resumption referred to in this section, and the right of pre-emption given by the 1st section of the Act of 1881 are rights exerciseable only by a landlord, and William Rattey is not a landlord. If the judicial rent is unpaid, a breach of one of the statutory conditions of the tenancy will arise, the appropriate remedy for which is ejectment for non-payment of rent; but even if Charles Kelly is held to be a tenant of a present tenancy, what language is there in the Redemption of Rent Act to give William Rattey the right to maintain an ejectment for non-payment of rent in such an event? Amongst the numerous provisions of the Land Acts under which persons acquire what may be termed constructive, hypothetical, or imputed characters, I do not find any by which a rentcharger is to be deemed to be a landlord.

In my opinion the Redemption of Rent Act has no application to cases in which the relation of landlord and tenant does not exist. It is entitled "An Act for the Redemption of Rent by Long Leaseholders and others," and the "others" must, in my opinion, be *ejusdem generis* with leaseholders.

It is not suggested that, where a lessee entitled under a lease for a term of

Land Com. 1893.

HAMILTON, *Grantor*; CASEY, *Grantee.*

Bewley, J.

rents reserved on immediate conveyances. Sect. 7 provides that "every such next immediate landlord shall and may have all such and the like remedies for the recovery of the rent reserved upon any such conveyance to his inferior tenant or tenants, as any landlord or lessor now has, or may, can, or shall have by virtue of any law now or hereafter to be in force in Ireland for the recovery of rent payable under a demise by which a reversion is reserved to or remains in such landlord or lessor." It is to be observed that here the grantee, under a perpetuity grant, who has made a sub-grant, is spoken of as "next immediate landlord," which shows that it was intended that the relation of landlord and tenant should remain.

The result of this legislation was that the immediate tenant of See lands was entitled to buy a fee-farm interest at a perpetual but variable rent. An inferior tenant was also entitled to buy a fee-farm interest, subject likewise to a fee-farm rent variable in certain cases.

"Fee-farm rent" is the term used to designate these rents by the highest living authority on Irish Ecclesiastical Law, the Right Hon. John Thomas Ball, LL. D., one of the Commissioners appointed in 1867 to inquire into the revenues and conditions of the then Established Church of Ireland, who contributed a valuable paper in the appendix to the Report of the Commission made in 1868 (p. 63), on the laws regulating the leasing and granting in perpetuity of lands belonging to ecclesiastical persons and corporations.

years has by a deed executed prior to Deasy's Act purported to sub-demise the lands for the same term at an increased rent, the sub-lessee, if the term is long, can maintain an application under the Redemption of Rent Act, and if the term is short, can apply to fix a fair rent under the Land Acts of 1881 and 1887; and I see no reason why the Redemption of Rent Act should apply to the redemption of one particular kind of rentcharge more than another. Sub-section 2 of the 2nd section of the Act shows that the Legislature did not regard "rent" and "rentcharge" as synonymous terms, and it appears to me that both the language of the Act, and the policy of the Land Acts and Land Purchase Acts with which it is to be read, lead to the conclusion that in a case like the present the right to redeem or fix a fair rent does not exist.

I do not base my judgment on any narrow or technical view of the nature of a fee-farm grant—such instruments as that of the 9th February, 1846, are

In my opinion the conveyance of the 1st June, 1842, is a fee-farm grant within the meaning of the 1st section of the Redemption of Rent Act, and the rent reserved by it is a fee-farm rent and not a mere rentcharge.

I should observe, however, that it was objected on the part of the grantor that even if this rent were to be treated as a fee-farm rent the fact that it was subject to periodical variation by statute excluded it from the operation of the Redemption of Rent Act. I think, however, that the statutory contract as to the variation of the rent can be controlled and overridden by the provisions of the Redemption of Rent Act and the Land Law (Ireland) Acts, 1881, and 1887, in the same manner as a contract entered into by deed, and that this objection also fails.

We have considered the evidence of value and the reports of the inspectors, and we are of opinion that the redemption price of the rent should be fixed at £2800, guaranteed Land Stock, and an advance of that amount sanctioned. The grantor must pay the costs of the appeal.

Solicitors for the grantor: *T. T. Mecredy & Sons.*
Solicitor for the grantee: *N. Downes.*

W. L.

frequently called "leases for ever," or "fee-farm grants"; but I base it on the broad ground that this Redemption of Rent Act, as well as the Land Acts of 1881 and 1887, and the Land Purchase Acts only deal with the rights of persons standing in the position of landlord and tenant. None of these statutes recognize a relation of quasi landlord and tenant. By section 37, sub-section 5 of the Land Act of 1881, it was provided that "the Court shall have jurisdiction in respect of all disputes between landlords and tenants arising under this Act." Where there is no tenancy there is no jurisdiction to fix a judicial rent under the Land Act of 1881, and I fail to see how proceedings can be successfully maintained under the Redemption of Rent Act, where a like foundation for jurisdiction does not exist.

The motion should, in my opinion, be granted.

W L.

Land Com. 1893. Feb. 28.

RICHARD GORMAN, Tenant; EMMA F. KINGHARMAN, Landlord (1).

Land Law (Ireland) Act, 1887 (50 & 51 *Vict. c.* 33), *s.* 1—*Lease for lives and years renewable.*

A lease for three lives or thirty-one years, with a covenant by the landlord to renew for one life, and for a concurrent term of twenty-one years, is not a lease within section 1 of the Land Law (Ireland) Act, 1887.

Appeal from Sub-Commission. The facts of the case, and the arguments of counsel appear sufficiently from the head-note and judgment.

Godfrey Fetherstonhaugh, for the tenant.

William Moore, for the landlord.

Bewley, J.:—

By an indenture of settlement, dated the 15th July, 1854, executed upon the marriage of the Hon. Robert Edward King (the eldest son of the Right Hon. Robert Lord Viscount Lorton), with the Hon. Augusta Chichester, it was, amongst other things, provided that it should be lawful for the said Robert Viscount Lorton, by any deed or instrument in writing executed in the presence of, and attested by one or more credible witnesses, to demise any part of the lands and hereditaments in the said settlement mentioned, and including the holding in the present case, for any term not exceeding thirty-one years, or three lives, to take effect in possession, and not in reversion, remainder or expectancy, or in case where the lessee in such lease should covenant to lay out a sum of not less than £300 in building a house or farm offices on the said demised premises, then for such term of thirty-one years, or three lives, with a covenant to add thereto an additional life,

(1) Before Bewley, J., and FitzGerald, Q C., Commissioner

Land Com. 1893.

GORMAN, *Tenant;* KING-HARMAN, *Landlord.*

Bewley, J.

with a further concurrent term of twenty-one years, upon the expiration of such original term of thirty-one years, or on the fall of the three lives named in such lease, so as in every such lease there should be reserved the best and most improved yearly rent that could be reasonably obtained for the premises thereby demised at the time of making such lease, without taking any fine or foregift, or anything in the nature or in lieu thereof.

By an indenture of lease, dated the 29th March, 1860, made between the said Robert Viscount Lorton of the one part, and Richard Gorman of the other part, after reciting the foregoing leasing power contained in the settlement of the 15th July, 1854, it was witnessed that the said Robert Viscount Lorton, in consideration of the covenant to expend £300 in building, thereinafter on the part of the said Richard Gorman contained, and also in consideration of the yearly rent, reservations, provisions, conditions, and agreements thereinafter reserved and mentioned, in pursuance of the said powers comprised in the said indenture of settlement, and of every other power him enabling, granted, appointed, and demised unto the said Richard Gorman, the several lands therein described, constituting the holding in the present case, to hold unto the said Richard Gorman, his heirs, executors, administrators, and assigns, for the life and lives of the three persons therein named, and the survivors and survivor of them, or for the term of thirty-one years, to be computed from the 1st November, 1859, running concurrent with the said three lives, whichever should longest continue, and from and during such further life, and concurrent term of twenty-one years, as should thereafter be added to the term of the said demise in pursuance of the covenant thereinafter contained, at the yearly rent of £66 0*s.* 4*d.*, payable as therein mentioned, and by the said indenture the said Robert Viscount Lorton, covenanted with the said Richard Gorman, that upon the death or failure of the *cestui que vies* therein named, or the expiration of the said term of thirty-one years, and upon the said Richard Gorman, his heirs, and licensed assigns, within six calendar months next after the failure of said lives, or expiration of such term, paying all arrears of rent due, and nominating a new life of any other person to be inserted in the place of the persons so happening to die as aforesaid, the said Robert Viscount

Land Com. 1893.

GORMAN, *Tenant;* KING-HARMAN, *Landlord.*

Bewley, J.

Lorton, his heirs and assigns, would add to the term of the said demise the life of the person so nominated, and renew the demise for the life of the person so to be nominated, and for the term of twenty-one years, to be computed from the date of such renewal, whichever should longest continue.

The *cestui qui vies* named in the lease, or some of them, are still living, and the lessee having instituted proceedings to have a fair rent fixed, counsel on behalf of the landlord has submitted that, having regard to the term granted by the lease and the covenant for renewal, the application cannot be sustained.

By the 21st section of the Land Act of 1881, it was enacted that leases and other contracts of tenancy existing at the date of the passing of the Act (except yearly tenancies and tenancies less than yearly tenancies) should remain in force to the same extent as if the Act had not passed: provided that at the expiration of such existing leases or of such of them as should expire within sixty years after the passing of the Act the lessees, if *bona fide* in occupation of their holdings, should be deemed to be tenants of present ordinary tenancies from year to year, at the rents and subject to the conditions of their leases respectively so far as such conditions are applicable to tenancies from year to year.

The 1st section of the Land Act of 1887 provides as follows [the learned Judge read the section].

There are some expressions in the judgment of at least one member of the Court of Appeal in *Fitzsimons* v. *Bangor* (1) that would support the view that "expiring within ninety-nine years" in this section means "which may expire within ninety-nine years," and if this were the law the lease in the present case would undoubtedly come within the operation of the section, as it is quite possible that both the original term of lives and years, granted by the lease, as well as any term granted in pursuance of the covenant for renewal, may expire within a period of ninety-nine years from the passing of the Land Act of 1881. But having regard to the more recent decision of the Court of Appeal in *Barton* v. *Atkinson* (2) such a construction of the section cannot be maintained.

The clause referred to means that the section shall apply only to leases whose term, if not previously determined, will expire by

(1) 28 L. R. Ir. 53. (2) 30 L. R. Ir. 396.

efflux of time within ninety-nine years, after the passing of the Land Act of 1881, and the succeeding clause provides that certain leases for lives or for lives and years, shall for the purposes of the section be deemed to be leases so expiring, such leases being no doubt regarded as leases whose duration in the ordinary course of events would not probably exceed this period of ninety-nine years. But for the second clause no lease other than a lease for a term necessarily expiring within the ninety-nine years period would have been within the benefit of the statute. The second clause includes and brings within the operation of the Act a lease for any life or lives existing at the passing of the Land Act of 1881, "with or without any term of years not exceeding ninety-nine years, where such term is concurrent, or thirty-one years, when such term is in reversion, and *not being renewable in any case*." The lease in the present case could only be brought within the operation of the section, as being a lease for lives with a concurrent term not exceeding ninety-nine years and not being renewable; but how can it be maintained that it is not renewable?

It is unnecessary, in my opinion, to consider whether or not the landlord in the present case could compel the tenant to take out a renewal. The lease is plainly a lease for a term of lives and years that is "renewable," according to the grammatical and legal meaning of the expression. If the contention of the lessee were held good, an ordinary lease for lives with a covenant for perpetual renewal would apparently come within the provisions of the 1st section of the Land Act of 1887. But it was to relieve such leaseholders amongst others that the Redemption of Rent (Ireland) Act, 1891, was passed. The 1st section of that Act is applicable to any lessee in *bona fide* occupation of a holding to which Part I. of the Land Act of 1881 applies, whose lease is one to which the provisions of the 1st or 3rd sections of the Land Act of 1887 do not apply, by reason of its being *renewable* or *perpetual*.

The lease in the present case is clearly one excluded from the Act of 1887, and within the Act of 1891, and if the lessee seeks any relief he must apply for it under the latter Act.

The order of the Sub-commission fixing a fair rent must be discharged, and the originating notice dismissed.

Solicitor for the tenant: *W. R. Fenton.*

Solicitor for the landlord: *Clifford Lloyd.* W. L.

Ex. Div. 1893.
Oct. 27.
1894.
Jan. 29.

AARON'S REEFS, Limited, *v.* TWISS.

(1891. No. 1447.)

Practice—Taxation of costs—Party and party—Third counsel on new trial motion—Action involving questions of importance, though brought to recover small claim—Discretion of Taxing Officer.

In an action to recover £20 the defendant, who pleaded fraud, obtained a verdict. The Taxing Master allowed the costs of three counsel upon a motion to set aside the verdict and enter a verdict and judgment for the plaintiffs, or for a new trial, certifying that he did so having regard to the nature of the case and the complicated and important questions involved.

The Court (Palles, C.B., and Andrews, J.; *diss.* Murphy, J.) declined to interfere with the discretion of the Taxing Master in respect of such allowance.

Motion by the plaintiffs to review taxation. The action was brought to recover £20, being the amount of calls on shares, and the defendant pleaded fraud and misrepresentation. The action was tried at Nisi Prius, and resulted in a verdict for the defendant. The plaintiffs then moved to set aside said verdict and judgment, and the said application was by an order of the Divisional Court, dated 29th June, 1893, refused with costs.

The following is a copy of the order:—

"The motion on the part of the plaintiffs to set aside the findings verdict and judgment directed in this case, on the grounds of misdirection by the learned Judge in not directing the jury to find for the plaintiffs, and in not directing them that there was no evidence of fraud on the part of the Company and no evidence of any fraudulent representation or concealment in the prospectus, or of repudiation by the defendant, and on the ground that the questions submitted to the jury by the learned Judge were not, nor were any of them, questions proper to be submitted to the jury, and that notwithstanding the findings of the jury on the several questions left to them the Judge should have directed a verdict for the plaintiffs, and also on the ground of the reception of illegal evidence, and

that the findings and verdict were against the evidence and the weight of evidence and on other grounds, and that judgment be entered for the plaintiffs with costs, or that a new trial be directed, and for the costs of the application, which was at argument on the 20th, 21st, and 22nd June, inst., on which days the Solicitor-General, Mr. Piers White, Q.C., and Mr. Murray, of counsel for the said plaintiff, and Mr. Ronan, Q.C., Mr. Bushe, Q.C., and Mr. Samuels, of counsel for the said defendant, were heard, being this day called on for the judgment of the Court. Whereupon, and counsel on both sides appearing and on reading the notice of this motion and the report of the said learned Judge, it is ordered by the Court that the plaintiffs' said motion do stand refused, and that the said plaintiffs do pay to the said defendant his costs of this motion and argument, when taxed and ascertained."

In accordance with the said order, the defendant's costs were taxed, and by his certificate, dated the 7th August, 1893, Master Coffey certified the said costs at the sum of £78 4*s.* 2*d.* In the said taxation Master Coffey allowed the costs of a third counsel on the hearing of the said application to set aside said verdict and judgment; and also a portion of the expense of obtaining from the official Law Reporter of the Queen's Bench Division a copy of the judgment of that Division in the case of *Aaron's Reefs, Limited* v. *Kiernan* (1), which portion was the sum agreed on between the solicitor for the plaintiffs and the solicitor for the defendant.

The plaintiffs then moved to disallow said items so allowed as aforesaid, and an order, dated 27th October, 1893, was made, the curial part of which is as follows:—"It is ordered by the Court that the said order, dated 29th June last, be amended by striking out after the words, 'on which days' the words commencing with 'the Solicitor-General,' and ending with 'defendant,' and by substituting therefor the words 'the Solicitor-General, and Mr. Murray (with whom was Mr. Piers White, Q.C.), of counsel for the said plaintiffs, and Mr. Ronan, Q.C., and Mr. Samuels (with whom was Mr. Bushe, Q.C.), of counsel for the said defendant,'

(1) A case involving substantially the same questions as the present.

Ex. Div. 1893.

AARON'S REEFS, LTD. v. TWISS.

and that the said order be further amended by adding in the curial part thereof, after the word 'argument' the words following, 'including the sum of £3 10*s*., the defendant's agreed share of the expense of obtaining from the Court Reporter a copy of the judgments delivered in the Queen's Bench Division in the case of *Aaron's Reefs Limited* v. *Kiernan*, and also the proper costs of one copy of the reporter's copy of those judgments,' and it is further ordered that the said items be referred back to the said Taxing Master for his reconsideration and determination having regard to the said amendments hereby directed to be made in the said order of the 29th June last, and that the costs of this motion on both sides be reserved until the said Taxing Master shall certify the result of his re-taxation of the said items."

The said items were in pursuance of the said order duly re-taxed by the said Taxing Master, who, by his certificate dated 23rd November, 1893, certified as follows:—"I considered this matter carefully, and having regard to the nature of the case and the complicated and important questions involved, I, in the exercise of my discretion, allowed the costs of the third counsel."

J. Murray, for the plaintiffs:—

The costs of a third counsel cannot be allowed unless there is something very exceptional in the case; and, in determining whether such circumstances exist, the amount of interest which the successful party has in maintaining or defending the action must be taken into consideration: *Smith* v. *Buller* (1); (and *vide* Malins, V.-C., p. 475).

The same principle is laid down in *Re Broad and Broad* (2). In *Barnhill's Estate* (3), it was held *per* Monroe, J., that the costs of a third counsel may be allowed as between solicitor and client where important interests are involved or where the client has previously authorized the retainer; and that very special circumstances should be shown in order to justify the Taxing Master allowing three counsel. There is nothing special or exceptional in this case to justify a departure from the ordinary rule. [Counsel also cited Gen. Ord. LXV., Rules of Court, 1891.]

(1) L. R. 19 Eq. 473. (2) 15 Q. B. Div. 252. (3) 29 L. R. Ir. 396.

Bushe, Q. C. (with him, *Samuels*) for the defendant :—

The question is entirely one of discretion with the Taxing Master ; and therefore the *onus* lies on the plaintiffs to show to the Court that there is nothing exceptional in this case. The Court will not interfere with the discretion of the Taxing Master unless some very strong reason for so doing is given : *Vines* v. *London, Brighton, and S. C. Railway Co.* (1). The Court will not interfere with the discretion of the Taxing Master unless to correct some error of principle into which the Master has fallen : *Burton* v. *Burton* (2). See also to the same effect *Hill* v. *Peel* (3), and *Robb* v. *Connor* (4). In *Re the South Meath Election Petition* (5) it is laid down that there is no fixed rule absolutely limiting for the purposes of taxation as between party and party the number of counsel to two upon a motion in the Common Law Divisions. [Counsel also cited *Re Lynch to Chance* (6).] No error of principle is shown in this case : the matter was entirely one for the Taxing Master. Besides having regard to the magnitude of the issues involved and the consideration necessarily bestowed on the case, and the length of time it was at argument, it was in no sense unreasonable to have three counsel.

The Court (Palles, C. B., and Andrews, J. ; *diss.* Murphy, J.) held, that the circumstances of the case were exceptional, and sufficient to justify the Taxing Master in allowing the costs of the third counsel, and the plaintiffs' motion was accordingly refused.

Solicitor for the plaintiffs : *C. R. M'Namara.*
Solicitor for the defendant : *E. White.*

J. P. B.

(1) L. R. 5 Ex. 201.
(2) 29 L. J. Ex. (N. S.) 291.
(3) L. R. 5 C. P. 172.
(4) Ir. R. 9 Eq. 373.
(5) 32 L. R. Ir. 407.
(6) 30 L. R. Ir. 278.

Q. B. Div. 1893. Nov. 7. 1894. Feb. 5.

THE QUEEN (MARSHALL) *v.* JUSTICES OF COUNTY TYRONE (1).

Licensing law—Certificate for spirit grocer's license—Suitability of premises—Licensing (Ireland) Act, 1874 (37 & 38 *Vict. c.* 69), *sect.* 9.

On an application to Justices at Petty Sessions for a certificate for a spirit grocer's license, under the Licensing (Ireland) Act, 1874, sect. 9, the Justices refused the application "on the ground of the unsuitability of the premises, from their locality being in the immediate neighbourhood of another public-house, and also close to a school and place of worship." On appeal to Quarter Sessions, the Chairman and Justices refused the application "on the ground of the unsuitability of the premises."

On motion to make absolute a conditional order for writs of *certiorari* and *mandamus* :—

Held (*per* Harrison, Gibson, and Madden, JJ.; *diss.* Sir P. O'Brien, C.J.), that the Justices, in considering "the suitability of the premises," were entitled to look beyond the question of the suitability of the *house* in which it was proposed to carry on the business of spirit grocer, and might have regard to the unsuitability of its situation and surroundings, *e.g.* proximity of a school or place of worship.

Assuming that the existence of other public-houses in the immediate neighbourhood could not be taken into consideration upon objection to the suitability of the premises, the order by the Court of Quarter Sessions being itself regular was not vitiated by the fact that one of the grounds stated upon the order of the Justices, from which the appeal was taken, was unwarranted in law.

Per Sir P. O'Brien, C.J.—The question arising on the expression "suitability of premises" is whether the premises are suitable for the sale of spirituous liquors, not whether the sale of spirituous liquors is suitable to the surroundings.

Motion to make absolute, notwithstanding cause shown, a conditional order for writs of *certiorari* and *mandamus* directed to the Chairman and Justices of county Tyrone, in regard to an order made by them at the General Annual Licensing Sessions, 1893, held at Strabane, refusing the application of James Marshall

(1) Before Sir P. O'Brien, C.J., and Harrison, Gibson, and Madden, JJ.

for a spirit grocer's license, under section 9 of the Licensing Act of 1874, the ground of refusal being stated to be the unsuitability of the premises.

The application for the conditional order was grounded on the affidavit of the applicant James Marshall, who carried on the business of a spirit grocer at Ballyfatton, in the said county. This affidavit, after proving the service of notice on the District Inspector of Constabulary, stated that the application for the certificate came before the Strabane Petty Sessions on the 25th September, 1893, when, notwithstanding the applicant's objection, Mr. Gallagher, solicitor for Messrs. J. and E. T. Herdman, was heard in opposition to the application. There was admittedly no objection to the good character of the applicant, or to the structural fitness of his premises, but the objection of the Messrs. Herdman was grounded on the proximity of the applicant's house to the neighbouring church and the National schools, and that there were three public-houses within the respective distances of a few hundred yards, one mile, and two miles. The applicant referred to certain proceedings in the Court of Queen's Bench in the year 1877, which will be found fully stated in the judgment of the Lord Chief Justice, *infra*. Mr. Risk, the solicitor for the applicant, argued at Petty Sessions that the order then made by the Court of Queen's Bench was binding upon the magistrates; and that evidence was not legally admissible as to the proximity of public-houses. The magistrates, however, refused the application, the curial part of their order being as follows :—"Refused unanimously on the ground of the unsuitability of the premises from their locality being in the immediate neighbourhood of another public-house, and also close to a school and place of worship."

The applicant appealed to Quarter Sessions, when his counsel objected to anybody being heard in opposition except the constabulary. The Court, however, ruled that the solicitor for the Messrs. Herdman should be heard. The evidence and objections were practically the same as those at Petty Sessions, Mr. Dickie, Sessional Crown Solicitor, on behalf of the constabulary, opposing, as stated in the affidavit of the applicant, "on account of the nature of the locality and surroundings, the proximity of a church and school, and the number of women and

Q. B. Div. 1893.

THE QUEEN v. JUSTICES OF TYRONE.

children employed in a factory in the village of Sion Mills, who might be tempted to procure spirits if the license were obtained, and that the wants of the place were already supplied by the existing license," *i. e.* that of the nearest public-house, owned by Mrs. Gallagher. The County Court Judge, His Honor Sir Francis W. Brady, Bart., Q.C., advised the magistrates present that, in point of law, "suitability of the premises" meant "suitability of the premises with reference to the locality and surroundings." After hearing evidence the application was refused by a majority. The order of the Court of Quarter Sessions was "Affirm order. Refuse application on the grounds of unsuitability of premises."

The following affidavits were filed as cause:—

I. Affidavit of Henry C. Tyacke, of Strabane, in the county of Tyrone, District Inspector of the Royal Irish Constabulary.

1. "I have read an attested copy of an affidavit of James Marshall in this matter, filed on the 16th day of October last, and with many of the statements therein, so far as I am therewith conversant, I agree that they correctly state the facts.

2. With reference to what occurred in the year 1877, I was not then the District Inspector of Constabulary for the district of Strabane, and I know nothing whatever of the proceedings in that matter, or whether or not the applicant applied for a spirit grocer's license, and a beer retailer's license, as he did last year when this Court refused to give him a *certiorari*, and the Court of Appeal confirmed its decision. I am not aware what the circumstances were connected with the obtaining of that order, or whether cause was shown, or was not, against same by the constabulary or anyone else.

3. I say that the village of Sion Mills is within the constabulary district of Strabane, and is situate within about two statute miles of that town, and contains about 1100 or 1200 inhabitants, all of whom are workpeople of the owners of the large mills there, and their wives and families. It has no fair or market. The applicant's house is situate immediately adjoining the village. I considered at the time the application was made, and still consider, that, having regard to the position of said house, and the circumstances of the surroundings, and the fact that the applicant

carries on a general grocery business in said house, these premises are unsuitable for a spirit grocer's license; and it would be especially objectionable, having regard to the great number of women and children going into the house to buy groceries and tobacco, to offer facility for the sale of drink in bottles at the same time therein.

4. It is quite true I made no objection on the ground of the personal character of the applicant, or to the house itself as unsuitable for the sale of drink, or to the conduct of such business therein, as indeed almost all houses are suitable enough for the sale of drink in bottles, but my objection was grounded upon the reasons I have already stated; and that it is not a question of the number of licensed houses at all, though this point was also discussed at the hearing, but it is solely upon the question that the position and situation of applicant's house is very unsuitable for a spirit grocer's license, and this for reasons above stated, and objected at the hearing of the application by the Chairman and Justices, before whom the application came.

5. When the appeal was heard at Quarter Sessions, it is not correct to say that Mr. Dickie, Sessional Crown Solicitor for the Co. Tyrone, who acted on my behalf, made no objection to the suitability of the premises. Mr. Dickie did object to the suitability of the premises for the reasons I have given, and in support of which he examined several witnesses to show that the premises were unsuitable, not by reason of any structural defect, but by reason of the applicant selling groceries, and owing to the character of the surroundings of the house, as above-mentioned, and although there was only a small majority of magistrates present who ruled with the Chairman, yet I am aware many of the magistrates of the districts who were not present are opposed to the granting of any such license, and I know of no license which would be more calculated to do injury to a respectable neighbourhood peculiarly circumstanced as this is than to give the applicant a spirit grocer's license for a house in which he now sells groceries continually to the women and children of this village."

II. Affidavit of Thomas Dickie, of Omagh, in the County of Tyrone, Sessional Crown Solicitor:–

Q. B. Div. 1893.

THE QUEEN v. JUSTICES OF TYRONE.

1. "I have read an attested copy of the affidavit of the said James Marshall, filed in this matter, on the 16th day of October last. I conducted this appeal at last Quarter Sessions on behalf of the Constabulary, and it is not accurate to say, as in said affidavit is set out, that I stated that no objection could be made either to the character of the applicant or the suitability of the premises. What I did say was that I opposed the license on the ground of the unsuitability of the premises only; and I explained to the Court and argued that the suitability of the premises was not confined to the mere structure of the house itself, but extended to its position as regards locality and circumstances, taking which into account in determining the suitability of the premises, more unsuitable premises than the applicant's could hardly be imagined. My conduct of the appeal, and the evidence I produced, were directed altogether towards this end.

2. I refer to the affidavit of Mr. Tyacke, District Inspector, which more fully sets out the grounds of my objection to the granting of the license; and at the hearing I referred to the difference between the wording of the section of the Act relating to beer retailers' licenses and the wording of the section dealing with spirit grocers' licenses relative to the suitability of the premises, and also to the fact that the Legislature had, in 1882, deemed it necessary to amend the Beer Retailers Act giving the magistrates fuller discretion than they had under it before, while it had not been deemed necessary to amend the Act of 1874.

3. I say it is correctly stated in applicant's affidavit that I opposed the setting forth in the order of the Court any further words than that 'the license was refused on the ground of the unsuitability of the premises,' as I respectfully submit, and did submit on the appeal, that it is not usual in an order to set forth the ground of the decision of the Court, but merely the result of that decision."

III. Affidavit of John Herdman of Sion Mills, in the Co. of Tyrone, Millowner, one of the firm of Messrs. Herdman & Co.:—

1. "I have read the copy conditional order served on me at the suit of James Marshall to obtain a spirit grocer's license for his premises at Ballyfatton, adjacent to the village of Sion Mills.

2. I and my brother Emerson T. Herdman are the owners of

Sion Mills and the village, and we employ in our mills and the works attached thereto 1100 operatives. There are besides some hundreds of inhabitants who do not work in the mills, and who are chiefly women, young girls, and children.

3. By reason of a retail license owned by Mrs. Mary Gallagher being already in existence in the townland of Ballyfatton, within a distance of two hundred yards off Mr. Marshall's house, and of two other licensed houses in neighbouring townlands, I say that the wants of the village as regards drink are amply supplied. The licensed premises of Mrs. Gallagher has for many years proved sufficient for all the requirements of the population.

4. The premises occupied by the said James Marshall for which he seeks a license are unsuitable by reason of their proximity to Mrs. Gallagher's licensed premises and to our village, and being within three hundred yards of the house of worship and the National school, which is attended by a large number of children; and I am satisfied that another reason why the said premises are unsuitable is, this license would have a demoralising effect upon the inhabitants of the village, and cause intemperance, improvidence, and poverty."

J. H. Campbell, Q.C., and *W. H. Brown*, for the applicant, James Marshall.

Matthew J. Bourke, Q.C., and *C. MacDermot*, for the Justices.

The points argued by counsel are fully noticed in the judgments.

Cur adv. vult.

1894. Feb. 5.

MADDEN, J.:—

This case raises an important question of general application with regard to the certificate which an applicant for a new spirit grocer's license must obtain under the Irish Licensing Act of 1874 from Justices of the Peace. The 9th section provides that "the certificate shall be to the good character of the person applying for the same, and to the suitability of the premises." In the present

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF TYRONE.

Madden, J.

case the applicant's character is, admittedly, good; and the question for our decision is as to the jurisdiction of the Justices in certifying, or refusing to certify, as to the suitability of premises in respect of which a spirit grocer's license is sought.

The facts are as follows:—The applicant, James Marshall, carries on business as a general grocer in the village of Ballyfatton, in premises which, so far as their structure is concerned, are, admittedly, suitable for the trade of a spirit grocer. His application for a certificate under the section from which I have quoted came before the Justices at the Strabane Petty Sessions on the 25th September, 1893. It was opposed by Mr. Tyacke, the District Inspector, on behalf of the police, and also by a solicitor representing Messrs. Herdman, who appear to be the owners of a mill, situated in the immediate neighbourhood, in which a large number of hands are employed. The Justices made an order in the following words:—"Refused unanimously, on the ground of the unsuitability of the premises from their locality, being in the immediate neighbourhood of another public-house, and also close to a school and place of worship."

The applicant appealed from this order to the Justices at Quarter Sessions, when he was again opposed on the part of the police and of the Messrs. Herdman. The application was again refused; this time simply on the ground of unsuitability of the premises, no specific ground of unsuitability being stated in the order.

The applicant obtained from this Court a conditional order for a writ of *certiorari* and *mandamus*, upon the ground that the orders refusing his application "were founded upon no due or legal objection to the granting of the certificate, and that the refusal to grant the said certificate was on grounds not warranted by law." The magistrates have shown cause, and the question which has been argued is whether the Justices at Quarter Sessions had jurisdiction under the section to which I have referred to refuse a certificate upon any ground other than the character of the applicant, and the structural suitability of the premises, by which expression I mean their suitability, taken by themselves, without regard to surrounding circumstances.

The applicant contends that the order at Quarter Sessions

must on the evidence be taken as affirming the order at Petty Sessions for the reasons stated in the latter. Thus it is attempted to be shown that absence of jurisdiction appears on the face of the proceedings. I must not be taken as adopting this argument. The Justices at Quarter Sessions made an order in a matter within their jurisdiction duly brought before them; and this order, taken by itself, is good on the face of it. I do not hold that any infirmity which may appear on the face of the order at Petty Sessions was imported into the order by which it was affirmed on appeal, so as to render it liable to be questioned by writ of *certiorari;* and, when I deal with the question which has been argued before us, I do so, assuming, but without deciding, that the proceedings themselves disclose that the ground of the magistrates' refusal was unsuitability of the premises other than structural.

We have not the advantage of a note of the evidence, but its general character appears clearly enough from the affidavit of the applicant, who represents it as directed to the question "whether my premises were near a certain church and school, and near to a certain public-house owned by a Mrs. Gallagher, and as to the number of women and children in the adjoining village who might call at my shop, and as to the requirements of the population for drink." From the same affidavit it appears that evidence was given that the population was peculiar, in consisting principally of women and children, of whom about 800 lived in the village adjoining the mills. "The County Court Judge," it states, "in giving the decision of the Bench, said, the reasons of refusal were on account of the proximity of the village of Sion Mills, in which were so many women and young persons who might otherwise be tempted to drink and to become unthrifty; and on account of the police being unable thoroughly to supervise a spirit grocer's house, and that for these reasons the premises were unsuitable." Mr. Herdman's affidavit does not deal with the evidence given at Quarter Sessions, and neither Mr. Tyacke's affidavit nor Mr. Dickie's add materially to that of the applicant.

In the view, however, which I take of the case the details of the evidence are unimportant. Either the Justices could look beyond the house itself to its surroundings, or they could not. If they could not, the order (in the form in which I assume it to

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF TYRONE.

Madden, J.

have been made) is bad. If they could, this Court cannot inquire into the justice of their decision, or into the sufficiency of the evidence upon which they acted.

I proceed, therefore, to consider what I regard as the only question in this case: can the Justices look beyond the question of the suitability of the house in which it is proposed to carry on the business of spirit grocer, taken by itself, and have regard to the suitability of its situation and to surrounding circumstances?

Now, in construing an Act of Parliament, when we have to deal with words which have acquired no precise technical signification, the first question to be asked is—what meaning do they convey according to the ordinary use of the English language? Ordinarily, in speaking of the suitability of a house or piece of ground for any specific purpose, we should be understood to include not only the thing itself but its surroundings. We should describe the most properly constructed house as unsuitable for human habitation if it adjoined a pestilential swamp, and the most eligible piece of ground as unsuitable for a rifle range if it lay in the centre of a thickly populated district. Is there any reason for giving a more restricted application to the word "suitability" in the section under consideration?

To answer this question on strictly legal principles we must consider the state of the law when the Licensing Act of 1874 was passed, and the particular mischief which the 9th section was intended to remedy.

Mr. Campbell has correctly pointed out that until a comparatively recent time any person who held a grocer's license in Ireland was as free to trade in spirits as in tea or sugar. But the current of modern legislation has distinctly set in the opposite direction from free and unrestricted trade in spirituous liquors. By little and little the freedom of the retailer of these goods has been restricted, and his position has been gradually assimilated to that of the licensed publican. This has been done in the interests of the general public, obviously upon the ground that the trade in intoxicating liquors, while a legitimate one, requires safeguarding and supervision, in the interests of the general public, to a far greater extent than traffic in articles less capable of abuse. Passing over earlier enactments, I find that spirit grocers as well as pub-

licans are dealt with by the Licensing Acts of 1872 and 1874. The 82nd section of the former Act provides that no renewal of a spirit grocer's license shall be granted without a certificate of two or more Justices to the good character of the applicant, and to the peaceable and orderly manner in which his business has been conducted. The 86th places the spirit grocer in the same position as the publican with regard to the hours during which his premises may be kept open for the sale of intoxicating liquors. Then came the 9th section of the Licensing Act of 1874, upon which the question in the present case depends, which extended the provision of section 82 of the Act of 1872, and enacted, "That in the case of a new excise license or transfer of an excise license under this section the certificate shall be to the good character of the person applying for the same, and to the suitability of the premises." And, lastly, the various enactments relating to the hours of closing apply to spirit grocers as well as publicans. Meanwhile the Legislature had been placing somewhat similar restrictions on the sale of beer to be consumed off the premises, and these culminated, in 1882, in a statute empowering the licensing Justices either to refuse or grant a certificate "in their free and unqualified discretion." The difference between this legislation and that applied to spirit grocers may be accounted for by the fact that the Beer Houses Act is later in date by eight years than the last statute dealing with spirit grocers. Thus the dealer in intoxicating liquors to be consumed off the premises has been gradually included in the restrictive legislation which had been already in the interests of the public applied to the trade of the publican. The section before us is the final step in this progress as regards the spirit grocer. The particular mischief against which it is directed is obviously the absence in the case of the former of some discretion or control, vested in Justices or licensing authority, with regard to the particular premises in which it is proposed to carry on a traffic in intoxicating liquors, similar to that which had been found necessary in the case of the publican.

In order to ascertain the nature and extent of this control, I turn to the 4th section of the Licensing Act of 1833. This section, as interpreted by judicial decision, provides three grounds of objection to an application for a new publican's license; and

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF TYRONE.

Madden, J.

unless one of these is established to the satisfaction of the Justices, they are not at liberty, in the exercise of a general discretion, to prohibit the issuing of the license. This I accept without question as the result of the decisions upon this section; and in particular of *Clitheroe's Case* (1), followed by this Court in *Reg.* (*Smith*) v. *Justices of the County Cavan* (2). These grounds are—1, the personal unfitness of the applicant; 2, the "unfitness or inconvenience of the house or place"; and 3, "the number of previously licensed houses in the neighbourhood." Now, it has not been controverted at the bar that it is the common practice of Justices acting under this section to refuse to sanction a license on account of the "unfitness or inconvenience" of the locality in which an otherwise unexceptional house is situated; if, for example, it were close to a school; to a place of worship; or so situated as to render efficient police supervision impossible or difficult. And, inasmuch as Justices have not in Ireland a general discretion in the matter, this jurisdiction must necessarily be exercised under the words of the section allowing an objection founded on the unfitness or inconvenience of the house or place. It is otherwise in England, where the licensing authority has a discretion which has not been conferred on it by the Irish law; and for this reason I do not think that we derive much assistance from English authorities in regard to the question before us. The words "house or place" in the 4th section of the Act of 1833, are defined by the 12th section of the Spirits (Ireland) Act, 1854, in a manner which plainly shows that they can have no more extended signification as regards locality than the word "premises" in the section before us. The term "unsuitability" is a compendious mode of expressing unfitness and inconvenience, and is, at least, as comprehensive. When, therefore, I find a certain kind of control committed to the Justices in relation to publicans' licenses, and when the Legislature, apparently influenced by the same considerations of public policy, deals with spirit grocers in language which I find to be practically identical, I am led to the conclusion that the character of the control is intended to be in both cases the same.

(1) Ir. R. 11 C. L. 412. (2) 30 L. R. Ir. 137.

Thus, applying the strict canons of construction to the section before us, and construing its language with regard to the antecedent state of the law, and to the mischief against which it was directed, I am led to the conclusion—always to my mind a satisfactory one—that we are at liberty to understand the words "unsuitability of the premises" in the sense which in ordinary use they would be understood to convey.

Mr. Campbell contends that inasmuch as the 9th section of the Act of 1874 is engrafted on the 82nd section of the Act of 1872, and as the latter refers to the Beer House Act of 1864, the 3rd section of which provides for a certificate of suitability "for the purpose of such sale," it follows that the same qualification must be attached to the word "suitability" in the section now before us. I do not think that his argument would be aided by the adoption of this view; for if the 9th section stood alone, I should understand it to refer to unsuitability for the purposes of the trade which it was proposed to carry on in the premises. This trade, however, is a retail traffic in spirits, and we should be shutting our eyes to the whole course of legislation for over half a century, if we were to ignore the fact that this has been dealt with as a business which may become injurious or dangerous to the public, if carried on by unsuitable persons, or in unsuitable localities. For example, the licensing Acts contain careful provisions for the prevention of tippling in the shops of spirit grocers—provisions which necessitate constant supervision on the part of the police. But if the argument on behalf of the applicant be well founded, the Justices would be bound to grant a certificate, although the premises were so located as to render this supervision a matter of difficulty, if not of impossibility. The policy of the entire licensing code must be borne in mind when we inquire from whose point of view the question of suitability is to be considered—from that of the trader, of the customer, or of the general public. There is no conceivable reason why the Legislature should intervene to secure suitable premises for the sale of spirits any more than for the sale of tea, so far as the interests of the trade, or, I should add, the convenience of the customer, are concerned. In regard to every other article of his trade, the public are left to the operation of self-interested motives in the mind of the

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF TYRONE.

Madden, J.

grocer. But if he wishes to sell spirits, he must satisfy a public authority that his premises are suitable ones in which to carry on such a trade,—suitable (it would seem to me necessarily to follow) in the interests of the general public. The public seem to me to be much less interested in the structure of a house in which they cannot consume the purchased spirits than in that of a public-house, while they are interested in the prohibition of unsuitable sites, in regard to both classes of houses.

The applicant states that a former application made by him for a spirit grocer's license was refused by the Justices on the grounds that there were already two public-houses in the neighbourhood, and that an increase in their number would be injurious. A conditional order for an order in the nature of a *mandamus*, under 12 Vict. c. 16, sect. 5, having been obtained by the applicant, no cause was shown, and the order was made absolute. An application for an attachment against the Justices for non-compliance with this order was instituted, but the proceedings appear to have been abandoned. These proceedings have, in my opinion, no bearing whatever on the present case, quite apart from the consideration that the order of this Court in 1877 was made without discussion. The number of licensed houses in any district is a ground of refusal totally distinct from the fitness, convenience, or suitability of the particular premises in respect of which a license is sought. It is distinct in its nature, and separately dealt with in the Act of 1833. I express no opinion as to the question involved in the former application. It may be that the Legislature, for reasons which are easily intelligible, has left the number of spirit grocers in any district to be determined by the ordinary laws of supply and demand. But, in regard to each individual application, it has, in my opinion, drawn no distinction between the publican and the spirit grocer, as regards the suitability of the premises in which he proposes to carry on his business. In each case it is the duty of the magistrates to protect the public from the carrying on of trade in spirituous liquors in an objectionable or dangerous situation. The situation of the premises appears to me to be a matter in which the public have far more interest than the structure of the house, which (especially in the case of a grocer) might safely enough be left

to considerations of self-interest. For these reasons I am of opinion that the magistrates, both at Petty and Quarter Sessions, acted within their jurisdiction, under the 9th section of the Act of 1874, and that the orders under consideration are good.

GIBSON, J.:—

In examining the meaning of the expression "suitability of the premises" in section 9 of the Act of 1874, on which the decision of this case must mainly depend, I do not deem it necessary to discuss the early legislation relating to spirit grocers. Some account of it will be found in Sir Joseph Napier's argument in *M'Kenna* v. *Pape* (1). In dealing with spirit grocers, as will be seen by referring to the statutes, the Legislature displayed great vacillation of purpose; but though fiscal and police considerations were kept in view, it would seem that a temperance motive from time to time influenced the action of Parliament, as is pointed out by Lord Westbury and Lord Cranworth in *Dickson* v. *Reg.* (2). This is particularly so in the statute 6 & 7 Wm. 4, c. 38, the 3rd section of which (repealed in 1845) disqualified grocers from holding an "on" license, and from selling spirits in quantities less than one pint. An earlier statute, previously repealed, had fixed the minimum at two quarts. Still there was always a marked distinction between spirit grocers and publicans. The statutes of 1872 and 1874 show an intention to bring spirit grocers to some extent within the scope of the restrictions and safeguards affecting publicans; and the question is, how far Parliament has gone in this direction.

1. There are three statutes before the Act of 1874 which it is desirable to consider. The first of these is the Licensing Act of 1833, the fourth section of which describes as one of the grounds of objection to a license, "unfitness or inconvenience of the house or place." According to *Clitheroe's Case* (3), by which I am bound though I may not agree with it, no objections other than those specified in this section are available for refusing a publican's license. This limitation of the grounds of objection made it natural to give an extended construction to the phrase "unfitness or

(1) 1 H. L. Cas. 6. (2) 11 H. L. Cas. 175. (3) Ir. R. 11 C. L. 412.

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF TYRONE.

Gibson, J.

inconvenience of the house or place." It would be strange if every man of good character, who chanced to be possessed of convenient premises, at a distance from any other licensed house, should be entitled, as of a right, to insist on a license and set up a public-house, without regard to the situation or neighbourhood, or to the requirements of police supervision. It has, therefore, been the established practice (as Mr. Campbell admits), in applying this ground of objection, to consider the question of police control, and proximity of places of worship or schools; but he contends that this enlarged construction depends—1, upon "inconvenience" being added to "unfitness"; and, 2, upon the word "place" being used as well as "house."

With regard to the first point, it is argued that unfitness is the same as unsuitableness, and that this latter term has been held in *Reg.* v. *Lancashire Justices* (1), to signify unfitness in structure only. I do not think that the case referred to can be regarded as a decision in point. In the first place, the Act 9 Geo. 4, c. 61, there under consideration, gave the licensing authority an unfettered discretion in granting or withholding licenses; and section 9 connects fitness of the person and of the house together. There was no need to give an extended construction to the term "fitness," which, so far as regards the applicant, was obviously personal, and as to the house, would naturally refer to fitness in the premises themselves. Secondly, the Court, when incidentally using "suitableness" as the equivalent of "fitness" in relation to structure, did not intend to decide that such was the primary or technical signification of the term. The language employed must be read in reference to the subject before the Court. As to the word "convenient"—in the New English Dictionary edited by Dr. Murray, I find among its meanings "fitting, suitable, appropriate." The Imperial Dictionary agrees with this. In Comyns' Digest, "Action upon the case for a nuisance (C)," it is said that no action for nuisance lies "if a butcher, brewer, &c., use his trade in a convenient place." This passage is discussed by Lord Westbury in *St. Helen's Smelting Co.* v. *Tipping* (2), and it was held that a place could not be "convenient" for carrying on a trade if actionable injury would result to a neighbour.

(1) L. R. 6 Q. B. 97. (2) 11 H. L. Cas. at p. 651.

With regard to the use of the word "place," it will be found that the words "house or place" form the subject of a statutory definition in 17 & 18 Vict. c. 89, s. 12. "Place" refers to the licensed premises as a whole, and does not merely mean locality. "House or place" together are the same as "premises" occurring in other statutes. In my opinion, the construction of the objection in the 4th section of the statute of 1833 would not be affected if "inconvenience of the premises" had been described as the ground of objection.

2. The next statute requiring consideration is the Beer Houses (Ireland) Act, 1864, which requires, as a condition to the granting of an excise license for sale of beer by retail off the premises, a certificate as to the good character of the applicant and the suitability of the premises for the purpose of such sale. In the case of a renewal or transfer, a certificate was also required to the peaceable and orderly manner in which the house was conducted in the past year. The statute prescribes the procedure with regard to the application for such certificate, and as to appeals. The words, "for the purpose of such sale," do not occur in the statute of 1874. It may be that they do no more than express what would otherwise be implied. If they import restriction of the meaning of "suitability," there is no such restriction in the Act of 1874. It will be observed that under this statute the certificate as to suitability of the premises must be renewed every year, which shows that suitability might depend on considerations occurring subsequently to the grant of the original license—in this respect differing from the ordinary publican's license. It was argued that "suitability" in this Act must mean physical suitability, as otherwise the amending Act of 1882 would become a nullity. I do not agree with this. The latter Act had for its main object the repeal of the restrictions in the English Act of 1869, and to give the Justices an absolute discretion. Whatever meaning be placed on the Act of 1864 it imposes some fetter on discretion, and the Act of 1882 removed that fetter. Thus, non-residence would not be an objection under the Act of 1864, though it might be acted on under the Act of 1882.

3. The statute of 1872 made a striking change in the law affecting spirit grocers, and shows a clear intention to subject

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF TYRONE.

Gibson, J.

such grocers to restrictions analogous to those affecting "on" licenses. No renewal of an excise license of the character described in section 82 could be granted without a certificate to the good character of the spirit grocer, and to the peaceable and orderly manner in which his business was conducted for the period therein specified. This safeguard is substantially the same as that required in the case of a publican under 17 & 18 Vict. c. 89, sect. 11. It was suggested in argument that the last clause of sect. 82 (which directs all applications by spirit grocers for such certificates to be made in the manner, and subject to the like conditions as to appeals and otherwise, as prescribed by the Beer Houses (Ireland) Act, 1864, in relation to applications for certificates under that Act), made it necessary for the spirit grocer to obtain a certificate as to the suitability of the premises. I do not concur in this assumption. Section 82 describes the certificate which it requires—that is, a certificate as to character and orderly conduct only. The reference to the Act of 1864 does not enlarge the certificate, but only prescribes the procedure for obtaining it.

4. This brings us to the Act of 1874, section 9, the first and only statute requiring a spirit grocer to obtain a certificate to the suitability of the premises; and the question before us is the construction of that section, which, in the case of a new excise license, or transfer of such license, requires a certificate to the suitability of the premises, as well as to the good character of the person applying.

Three different interpretations have been suggested. The first is that pressed by applicant's counsel, which is that commodiousness of structure and convenience of access only can be considered; that site only enters into the question so far as relates to access; and that, if in structure and site the premises meet the convenience of customers, the certificate of suitability cannot be withheld. A second construction is that what is meant is suitability for the trade contemplated by the Legislature, taking into account the statutory restrictions and safeguards affecting it. On this view, convenience for police supervision and control must be taken into consideration. A third and still larger interpretation is that "suitability" must be ascertained not merely with reference to the requirements of the customers, or of public order and police,

but also from consideration of the neighbourhood in which the spirit grocery is to be carried on, and that the phrase should be interpreted substantially in the same way as the objection in sect. 4 of the statute 3 & 4 Wm. 4.

In arriving at the true construction of this statute, it is worth while to refer to the English Law, according to which no objection founded on the structure, site, suitability, or value of the premises is available as a ground for refusing an "off" spirit license: *Reg.* v. *Morison* (1). Accordingly, the circumstance that the premises proposed to be licensed communicate with other adjoining premises in an objectionable manner is not a valid ground for declining such license. *Tassell* v. *Ovenden* (2) shows the results that may flow from this. The present law in England, like the law in Ireland formerly, is based apparently on the assumption that suitability of the premises is the affair of the parties, and that the public does not require greater protection or better accommodation when buying spirits in bottle, than when purchasing vinegar in bottle, tea, coffee, paraffin oil, or other goods. For ordinary trading it may be left to the self-interest of the merchant to provide suitable premises. This view, on which the English legislation proceeds, supplies an argument of some force in construing the Act of 1874. In prescribing as an essential condition the suitability of the premises, our Act would be likely to contemplate something besides the physical comfort and convenience of the consumer. In the case of pawn-shops, where one would expect that the convenience of the public would require more attention, there is no legislative provision requiring the premises to be suitable: *Reg.* v. *Woodlock* (3).

In the ordinary dictionaries (*e.g.* Whitney's Centenary Dictionary), "suitable" is represented, among other meanings, by "fitting, appropriate, proper." In the New English Dictionary, one of the meanings of "convenient" is "suitable," and in 11 H. L. Cases, at p. 651, Lord Westbury treats "convenient" and "suitable" as synonymous. In the cases relating to ways of necessity, a "convenient" way is frequently described as "suit-

(1) 55 J. P. 87. (2) 2 Q. B. Div. 383. (3) 12 L. R. Ir. 178.

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF TYRONE.

Gibson, J.

able": cf. *Pearson* v. *Spencer* (1), and *Gayford* v. *Moffatt* (2). I am inclined to think that in common use the latter word has a wider signification than the former.

I am of opinion that suitability and unsuitability are substantially the same in effect as the fitness and convenience and unfitness and inconvenience contemplated by the statute of Wm. 4, and let in considerations of the same character, whatever those considerations may be. Under the Act of 1833 it lies on the objector to negative convenience; under the statute of 1874 the onus of proving "suitability" is on the applicant, a difference which rather suggests a larger discretion in the Justices in certifying.

With regard to police supervision, it has been pressed that even assuming that premises constructed in such a way as to facilitate evasion of the law might be unsuitable, no such objection could prevail if the difficulty arose from an external accidental circumstance, such as remoteness of the premises from a police station—a matter which might depend on the transitory arrangements of the executive of the day. But surely site must in this matter be considered as well as structure. Take the case of premises in Kerry, miles away from a police station. Police supervision in such a district would be impossible, and the law would be violated with greater impunity than in case of premises in a town designed and constructed to facilitate illegal trading.

As to the proximity of places of worship, schools, &c.—if premises in a cathedral close, or at a monastery like Mount Melleray, would be "inconvenient" for the purpose of a publican's license, I do not see that the same premises might not be deemed "unsuitable" for a spirit grocer's shop. That the trading would be limited to six days a-week does not remove the objection, as on church holidays and festivals there would be divine service, and the law is violated on week-days as well us on Sundays. If matters of moral fitness, such as nearness of a church or school, are allowed to enter into the consideration of suitability, it is, no doubt, hard to draw the line. Thus is the number of

(1) 1 B. & S. 571. (2) L. R. 4 Ch. 133.

previously licensed houses an element to be taken into account? It cannot be included, certainly, in "unfitness or inconvenience," in sect. 4 of the Act of 1833, as it is there specified as a separate ground of objection. How the case would stand if the words "unfitness or inconvenience" occurred without any restricting context it is unnecessary to say. In the statute of 1874 there is no such restrictive context.

I prefer to express no independent opinion on this point, which was not argued, though I did not understand Mr. Bourke to make any admission. I shall assume in Marshall's favour (without deciding), that the word "suitability" cannot be construed or applied as in any way depending on the number of previously licensed houses. Supposing, however, that it would be illegal to refuse the license on the ground of the number of previously licensed houses, the order made on appeal at Quarter Sessions is not open to this objection. It is on its face regular, and in affirming the order below, it cannot be taken as adopting all the reasons given by the Court of First Instance. That Court found the premises to be unsuitable on two grounds—the neighbourhood of a public-house, and proximity to a school and place of worship. It is not necessary to decide the point, but I am not to be taken as holding that the presence of a bad reason, unnecessarily stated, in such a case as the present, vitiates an order showing on its face a distinct good ground of adjudication. However this may be, the appeal order cannot be construed as incorporating as a reason for the decision the neighbourhood of the public-house.

The next objection taken to the order was that it was made in fact on illegal grounds, and therefore without jurisdiction. And here I may say that the affidavits on both sides are in a most objectionable form. Instead of stating the evidence as given below, the contentions urged on both sides, and the judgment pronounced by the Court, they present practically but a confused version of the arguments, and it is only by accident that any facts are allowed to appear. Impeachment of bad arguments urged below, even if they prevailed with the Justices, does not necessarily overthrow the decision of the Court of Quarter Sessions; and the latter Court may have decided rightly, and without any excess of jurisdiction, notwithstanding that invalid reasons were added to

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF TYRONE.

Gibson, J.

good ones by the Court in pronouncing judgment. Without having the evidence before us it is not easy to be certain what the objections really were,. or how far they were supported. Thus I am not quite certain if the objection founded on the nature of the applicant's grocery business may not have been misunderstood. It is, of course, necessary that a grocer should deal in goods of a particular class to be qualified to obtain an "off" spirit license. But where the grocery premises are in a country village like Sion Mills, and the business carried on is that of a general store, some ground of objection might exist with regard to police supervision, from the numbers of women and children constantly thronging in and out, at all hours, of premises on which the mode and nature of the business might, in the absence of special structural arrangements, render evasion of the law easy. Unfortunately, we have no accurate note of the evidence or of the language of the capable and experienced County Court Judge when announcing the decision. It is possible that all the reasons relied upon were not valid; it is enough if some were good. The difficulty of police supervision was one of the grounds mentioned by the chairman, as appears from Marshall's own affidavit. This would unquestionably be a sufficient legal ground if there was evidence to support it. This Court ought not to control or overrule the local tribunal upon questions of fact or inference fairly deducible from the evidence and circumstances of the case. We have not the evidence before us in any accurate or reliable form, and I cannot say that the Court of Quarter Sessions exceeded their jurisdiction, if they found as a fact that the premises were unsuitable on the materials before them.

The orders of the Queen's Bench in 1877 were also relied upon, but the case was not reported, and we can hardly be quite certain of the *ratio decidendi;* the applicant apparently dropped the case, and did not follow up the orders by any decisive action. It is possible that, in consequence of no cause having been shown against the *certiorari*, the Justices were not allowed to resist *mandamus* by setting up grounds referred to and condemned in the *certiorari*, particularly the number of previously licensed houses. Be this as it may, the present case is substantially distinguishable.

Whatever be the construction of the objection in the Act of

1833, the expression "suitability of the premises" in the statute of 1874 ought not to receive a more restricted meaning. Without binding Mr. Campbell by his admission as to the practice under the former Act—though I believe from inquiry that he was right, —the decision in *Clitheroe's Case* (1) makes it necessary to give an extended interpretation to the word "convenience." If a license can only be refused on one of the three grounds mentioned in section 4, two of those grounds are rigid. The only one admitting of any elasticity or discretion is that founded on inconvenience of the premises. I cannot believe that a person of good character, possessed of premises structurally suitable, at a distance from any other licensed house, would be entitled as of right to compel the Justices to grant him a license, if the premises were in the wilds of Donegal, miles from a police barrack, and outside the possibility of police control. If considerations external to the premises are admissible under the Act of 1833, they are relevant in interpreting "suitability" under the Act of 1874, which contains no restrictive context.

HARRISON, J. :—

I concur.

SIR P. O'BRIEN, C.J. :—

This case involves one of the most important questions which could be presented for our determination upon the licensing statutes. That question is, What is the meaning—the legal meaning—of the expression "suitability of the premises" in the 9th section of the Licensing Act of 1874? Do these words, "suitability of the premises," mean suitability having regard to the requirements of the customer, having regard to the accommodation provided for the public, and the access by the public to the premises, or do they bear the more extended meaning of, not merely suitability as regards accommodation and access, but suitability with reference to environment? Does, in fact, the expression, "suitability of the premises," mean, not merely whether the premises are suitable for the sale, but also whether

(1) Ir. R. 11 C. L. 412.

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF TYRONE.

Sir P. O'Brien, C.J.

the sale on the premises is suitable to their surroundings—whether the structure being sufficient for the accommodation of the public, and suitable for the proper conduct of the business, and there being no objection by reason of site as to access, the magistrates can, nevertheless, decline to grant the necessary certificate on the ground of unsuitability of the premises, because a grocer's establishment, in respect of which the license is sought, may be near a place of worship, or a school, or a mill, or a public-house, or any description of factory, or place, or depot, where persons work or congregate.

This is the general question involved. It is only requisite to state it to see that it is one of very considerable importance. Now, as to the circumstances of the particular case. A grocer named James Marshall of Ballyfatton, in the county of Tyrone, applied for a spirit-grocer's license to sell spirits by retail, not to be consumed on the premises, at his house and premises, which were a grocery establishment. The application was opposed by the constabulary, and was refused by the magistrates on the ground, as appears by the certificate of the Petty Sessions clerk, "of the unsuitability of the premises, from their locality being in the immediate neighbourhood of another public-house, and also close to a school and place of worship." The certificate having been refused by the magistrates, the applicant appealed to the Quarter Sessions, and, according to the certificate of the Clerk of the Peace, the order of the magistrates was confirmed, and the application of the appellant refused, on the ground of the "unsuitability of the premises." It will be observed that the grounds of refusal are more specifically stated by the magistrates at Petty Sessions than in the order of affirmance at Quarter Sessions. That is to say, the former stated specifically what the grounds of unsuitability were, whilst the order made at Quarter Sessions did not do so; but both Petty Sessions and Quarter Sessions rejected the application on the ground of the "unsuitability of the premises." Upon this ground, and no other, the application was refused. It is said that the magistrates at Quarter Sessions included under the head of "unsuitability of the premises," a ground upon which the magistrates at Petty Sessions did not rest their decision, namely, that the premises of the

applicant could not be thoroughly supervised by the police. As this alleged ground has been made the subject of considerable observation, I desire to examine it a little closely. Now, in the first place, this is not at all the ground of decision of the magistrates at Petty Sessions. Their decision, as I have already stated, proceeded on the ground that the premises were unsuitable, because they were in the immediate neighbourhood of another public-house, and also close to a school and place of worship. But now let me deal with the order at Quarter Sessions. The ground taken by the District Inspector Mr. Tyacke, as appears from his affidavit showing cause, was this. The third paragraph in his affidavit is as follows:—"I say that the village of Sion Mills is within the constabulary district of Strabane, and is situated within about two statute miles of that town. It contains about eleven or twelve hundred inhabitants, almost all of whom are work people of the large mills there, and their wives and families. It has no fair or market. The applicant's house is situate immediately adjoining the village. I considered," he says, "at the time the application was made, and I still consider that, having regard to the position of the said house, and the circumstances of the surroundings, and the fact that applicant carries on a general grocery business in said house, these premises are unsuitable for a spirit grocer's license; and it would be especially objectionable, having regard to the great number of women and children going into this house to buy groceries and tobacco, to offer facility for the sale of drink in bottles at the same time therein." In the fourth paragraph of his affidavit he adds:—"It is quite true that I made no objection on the ground of the personal character of the applicant, or to the house itself as unsuitable for the sale of drink, or *to the conduct of such business therein*, but my objection," he continues, "was grounded upon the reasons I have already stated."

In the 5th paragraph of his affidavit he said the Crown Solicitor made objections, for the reasons he (Mr. Tyacke) gave, and examined witnesses to show that the premises were not unsuitable by reason of any structural defect, but by reason of the applicant selling groceries, and owing to the character of the surroundings of the house, as mentioned above. It will be seen, however, that it was not to the character of the house, but to the character of its

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF TYRONE.

Sir P. O'Brien, C.J.

surroundings, or rather to the fact that in the surroundings there were a number of persons who might be tempted to drink. What he really meant was that these people would be tempted to buy spirituous liquor, take it away in bottles, and consume it elsewhere. It will be seen that Mr. Tyacke did not make any reference whatever to the premises being remote from a police barrack. He did not, indeed, say a single word about police supervision. He made no objection as to the character of the applicant, as to the structure of the house, or as to its suitability for the proper conduct of the business. So far from making any objection on these grounds he admitted that in respect of them he had none to make; and he tells us expressly that it was by reason of the objection he did make that the magistrates at Quarter Sessions came to the conclusion at which they arrived. Mr. Dickie, the Sessional Crown Solicitor, also made an affidavit, but he refers to the affidavit of Mr. Tyacke as fully setting out the grounds of his objections to the granting of the license. Mr. Herdman, upon whom the conditional order was served, also made an affidavit. He states his grounds of objection in the 4th paragraph of his affidavit, namely, that the premises occupied by the said James Marshall, and for which he seeks a license, are "unsuitable by reason of their proximity to Mrs. Gallagher's licensed premises, and to our village, and being within 300 yards of a house of worship, and the national school, which is attended by a large number of children; and I am satisfied," he continues, "that another reason why the premises are unsuitable is that the additional license would have a demoralizing effect upon the inhabitants of the village, and cause intemperance, improvidence, and poverty."

Now I have read all the affidavits which have been made by way of cause against the conditional order, and it will be seen that no objection was made by reason of structural unfitness, by reason of any difficulty in properly conducting the business in the premises, or by reason of the character of the applicant, and that no reference whatever is made in any affidavit to the situation of the premises as regards distance from a police barrack; the relative position of premises and police barrack is not dealt with or referred to in any single passage of the affidavits which were made in support of the magistrates' decision. True, in the 15th

paragraph of the affidavit of the applicant, there is the statement that the County Court Judge said the reasons of refusal were on account of the proximity of Sion Mills, in which were so many women and young persons, who might otherwise be tempted to drink, and to become unthrifty, and on account of the police being unable thoroughly to supervise a spirit grocer's house. Not a word, it will be perceived, was said as to relative position of premises and police barrack. It has been said that the reason for this statement was that the position of the police barrack was such with reference to the house that it could not be thoroughly supervised, and that, therefore, the premises were unsuitable. I don't think this is at all the meaning of the language used, or what was meant by the learned chairman. What he meant was that a spirit grocer's business is, from its nature, difficult of supervision, but in this context I may refer to the admission of Mr. Tyacke that the premises were suitable for the "conduct" of the business therein.

One thing, however, cannot be gainsayed—that the application for a license was refused on account of the alleged "unsuitability of the premises." Now, what is the law? Unquestionably this, if the magistrates attached to the expression "unsuitability of the premises," a meaning it did not legally bear, and rested their judgment on such unwarrantable interpretation, their action can be reviewed here and the order made by them quashed. It is not the mere exercise of discretion, but it is a decision on wrong grounds in point of law that can be reviewed. What, then, were the grounds on which the magistrates rested their determination as to the unsuitability of the premises, and were these legal grounds? Did they exceed their jurisdiction in resting their decision upon grounds which are not included under the head of unsuitability of the premises? I have already indicated the grounds upon which the magistrates at Petty Sessions and Quarter Sessions held the premises unsuitable. To test the validity of these grounds it is necessary to consider the course of legislation on this subject. Down to the year 1872 no certificate at all was requisite as a condition of a spirit grocer's license, and then for the first time by the 35 & 36 Vict. c. 94, s. 82, it was made essential to the grant of a spirit grocer's license that there should be a

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF TYRONE.

Sir P. O'Brien, C.J.

certificate to the good character of the applicant, and, in case of a second application, to the peaceable and orderly character of the way the business was conducted. There was no certificate then requisite as to the suitability of the premises. This certificate was for the first time made essential in the case of a spirit grocer's license by the Act of 1874 (37 & 38 Vict. 69).

Now, I ask, when no certificate at all was requisite in the case of a person applying for the first time for a spirit grocer's license until 1872, and then only as to the good character of the applicant, is it to be supposed that by the condition imposed as to suitability of the premises by the Act of 1874, the Legislature meant such a wholesale change in the law as to invest the magistrates with a discretion not only with reference to structural arrangements necessary for the accommodation of the public, and the proper conduct of the business, but also in reference to the external conditions as regards surroundings and to the moral and æsthetic considerations that might arise in respect of these surroundings, and which considerations might fluctuate not only according to the various idiosyncrasies of different magistrates, but with the varying aspects and conditions of the physical surroundings themselves and their occupants. Why this would, having regard to the necessity for the other certificate for good character and proper conduct of the business, be practically giving to the magistrates an absolute discretion. The words used in the statute, "suitability of premises," do not, in my opinion, effect this result. The natural and ordinary meaning of the words is, in my judgment, whether the premises are suitable for the sale of spirits, and not whether the sale of spirits is suitable to the surroundings. The case of *The Queen* v. *The Justices of Lancashire* (1) indicates what was Mr. Justice Lush's opinion on what was meant by the expression "suitableness of the premises." No doubt the case itself did not involve the determination of the question now at issue; but in dealing with the expression "fitness of the house" in the 1st section of 9 Geo. 4, c. 61, Mr. Justice Lush treats it as equivalent to suitableness of the house and puts it in contradistinction to other considerations which, as he said, included "*the nature of*

(1) L. R. 6 Q. B. 97.

the locality, the population, and the number of houses already licensed." On one side he puts suitableness of the house; on the other he puts nature of the locality, population, &c. And so in the present case, I think that the expression "suitability of the premises" does not involve considerations relating to the physical surroundings of the premises or moral considerations affecting the population of these physical surroundings. But, as I said, if by virtue of the expression "suitability of the premises" the magistrates can regard not only the physical surroundings of the premises, but æsthetic considerations relating to locality, and moral considerations which may affect the population, the Legislature certainly employed strange language to express its meaning; and that, too, when it was wont when it wished to confer an absolute discretion to express its meaning in language appropriate for the purpose: see the statute upon which *Sharp* v. *Wakefield* (1) was decided, and see also the Act of 1882, the 45 & 46 Vict. c. 34. Upon the latter Act, Mr. Campbell founded an argument which deserves to be noticed. He says the first section of that Act in appropriate language gives an absolute discretion; the Act says that the magistrates in their unqualified discretion may grant or refuse a license. This is as regards a beer-dealer's license. Now, what Mr. Campbell argues is this:—What was the necessity for this Act if the expression "suitability of premises" had that all-embracing significance that now is sought to be attached to it.

A certificate as to the good character of the applicant, and to the suitability of the premises for sale was, in the case of beer-house licenses, already required by the Beerhouses Act of 1864 (27 & 28 Vict. c. 35), sect. 3. It cannot, I think, be successfully argued that there is any difference between the expression "suitability of the premises for the purposes of such sale" in the Act of 1864, and the expression "suitability of the premises" in the Act of 1874. We are all agreed upon this. But the argument which Mr. Bourke mainly relied upon, and which has found acceptance with some members of the Court, is one based upon the Licensing Act of 1833. It is said that the words in the 2nd section, "unfitness or inconvenience of the house or place," means, not

(1) [1891] A. C. 173.

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF TYRONE.

Sir P. O'Brien, C.J.

merely unfitness of the house and inconvenience of the premises with reference to customers resorting to the house, but inconvenience with reference to the external surroundings; that is to say, that it was a condition of the license that the business premises should be not merely commodious for and easily accessible to customers, but should be suitable to the surroundings. It is alleged that this was a condition of a publican's license under the Act of 1833, and that the expression "suitability of premises" in the Act of 1874 is identical in meaning with what was required by the Act of 1833. Mr. Campbell is said to have admitted that under the words "inconvenience of the place" suitability with reference to surroundings could be taken into consideration. He certainly seemed for a time to argue on that basis, but when pressed by me as to his exact position with reference to this, he said that what he meant to argue was that assuming for the purpose of argument that the words in the Act of 1833 bore the more extended meaning, they were different from those used in the 9th section of the Act of 1874, and apparently wider in their signification, because in the Act of 1833 the expression "inconvenience of the place" was used. He contended that the language of the Act of 1833, even if it bore the meaning attributed to it by Mr. Bourke, afforded an argument in his favour, because it was apparently wider in its significance, and was not adopted in the 9th section of the Act of 1874.

Now, something has been said as to the practice under that Act of 1833. There is no evidence whatsoever before us as to any practice under that Act. I am convinced there is no settled practice under it. I find that the words "house" and "place" are by the 17 & 18 Vict. c. 89, defined to mean, to express it shortly, "house and premises." Now it appears to me that the words "unfitness of the house and inconvenience of the premises," in their natural and ordinary meaning, present for determination the question whether the house and premises are unfit and inconvenient for the business and not whether the business done in the house and premises is unfit or inconvenient for the surroundings. But what do we find in the Act of 1833 itself? That the expression "unfitness of the house or inconvenience of the place" is used in contradistinction to "the number of pre-

viously licensed houses in the neighbourhood." Here we have a distinction between matters external to the premises, namely, other public-houses in the neighbourhood, and the unfitness and inconvenience of the premises themselves. It would appear to me that the only thing external to the premises that could be taken into consideration is that which is expressly referred to, namely, public-houses in the neighbourhood; and it has not been even pretended during the course of the argument that the question of the number of public-houses in the neighbourhood could be taken into consideration under the expression "suitability of the premises." It was a matter expressly stated in the Act of 1833, in relation to which the magistrates were to exercise their discretion.

Hitherto I have dealt with the argument founded on a consideration of the language of the Act of 1833, on the basis that it was identical in meaning with the language used in the 9th section of the Act of 1874—on the basis that the expressions in these respective statutes were convertible, but at the same time I wish not to be taken to have decided they are identical in meaning, as a public-house and a spirit grocer's establishment are different in their character. A public-house, with its consumption of spirituous liquors on the spot, may be offensive to its surroundings, whereas a spirit grocer's establishment, licensed to sell spirits for consumption off the premises, is not at all equally likely to be attended with the elements of disturbance, noise, and offensiveness which sometimes attend public-houses.

And if we are to regard æsthetic considerations, it must be remembered it is not a case of converting merely residential streets and squares into places where business is to be carried on for the first time, because the foundation of a spirit grocer's license is that there is already in existence a grocer's establishment.

It has been said that when applying for the license the applicant must serve a notice describing "the situation" of the house, and that "situation" involves locality, and all the considerations affecting any particular locality, but the object of describing the situation is merely to enable the house to be identified when licensed, to ascertain the premises to which the license applies, and so as to enable those who wish to object to the license being granted to identify the premises sought to be licensed. See on

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF TYRONE.

Sir P. O'Brien, C.J.

this point the judgments in *Reg* v. *The Justices of the Perknage Division of Staffordshire* (1), especially the judgments of Hawkins and Wills, JJ. It has also been argued that if you are not allowed to take into consideration the nature of the surroundings you give practically no effect to the words "suitability of the premises." I do not at all agree with this proposition. The magistrates should see that the place is really a grocery establishment, not a mere shanty erected in some remote place, where, under the guise of grocery business, a retailing of whiskey for consumption on the premises may be the real business, but that the structure or establishment is not alone commodious for the public, but that it is proper for an "off" license, where the proprietor or the person who represents him, or the police, if they come there, can see that the customers do not drink on the premises, and that the character of its structure does not afford facilities for converting what was intended as a place for selling spirits for consumption off the premises into a place which in its nature affords facilities for evading the law and preventing the proper conduct of the business.

It is said that the learned County Court Judge used the expression "on account of the police being unable thoroughly to supervise a spirit grocer's license." Well, assuming that he did, though, in my opinion, no such ground is put forward in the affidavits by way of cause, still, is this a good ground of decision? Is it to be said that the very condition which enables a spirit grocer's license to be got, namely, the existence of a grocer's business, is a legal ground for refusing the license? There is not, as I have already said, a single word in any affidavit about remoteness from police barrack, or any suggestion that remoteness from police barrack (if a good ground of objection, and I think it is not), or structural defect, or any difficulty by reason of access, would prevent the place from being thoroughly supervised by the police. Indeed, if the fact of the remoteness of a police barrack was a good ground of objection, a premium would be offered to those who sought a license, or to their friends, to make the country disturbed, and thereby secure the proximity

(1) 56 Justice of the Peace, 87.

of a police barrack. And if a police barrack is in the vicinity when a license is granted, is it, when it is sought to be renewed, to be refused because it may be deemed no longer essential, owing to the reformed character of the vicinity, to have a police barrack there? A poor reward for good behaviour! If a man is of such a character as to render it likely that he would abuse a license if he got one because a police barrack was not near, he should not, having regard to his character, get a license at all; but this would be a result flowing from a consideration of the character of the applicant, and not of the suitability of the premises.

But what was the true and real ground of objection to this license? That the mill hands could have too great facilities of purchasing drink—moral considerations arising by reason of the proximity of the mills. To give effect to these moral considerations may justly elicit in its fullest development the laudable zeal of the apostles of temperance, and make them struggle to extend the Beerhouse Act of 1882 (45 & 46 Vict. c. 34) to spirit grocers' licenses, and thereby give to the magistrates in the case of spirit grocers' licenses an absolute discretion; but no such object as was sought to be attained here can, in my opinion, be reached by any legal interpretation of the words "suitability of the premises."

What has been already done in this Court? We have the clearest expression of opinion from those who ranked amongst its most eminent Judges. I have here a *précis* made by our officer to which I would direct special attention. In the year 1877 (Queen's Bench Division, 23rd February) a conditional order was obtained by the present applicant calling upon Messrs. T. W. D. Humphreys and E. T. Herdman, the individual Justices who had heard the application originally, to show cause why they should not grant to the applicant a certificate for a spirit grocer's license; and why their order refusing his application should not be quashed upon the ground that their refusal was upon grounds not warranted by law. The grounds of the Justices' refusal upon that occasion—there can be no doubt upon the matter—for they were put in writing and signed by the Justices, Messrs. Humphreys and Herdman, were thus stated:—"We decline to grant the license, on the ground that there are already two public-houses in the immediate neighbourhood of the factory village of Sion Mills fully

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF TYRONE.

Sir P. O'Brien, C.J.

equal to the requirements of the place; and we think an increase of public-houses or facilities for the purchase of spirits would be injurious to the neighbourhood."

This last was, in my judgment, the real ground of their refusal. Well, what was done in that case? The conditional order was made absolute on the 19th April, 1877, no cause being shown. And subsequently (2nd July), an attachment motion was instituted against the two Justices for disobedience to the order of this Court, and (on the 23rd November), as appears upon the records of the Court, it was ordered, after argument, that the motion should further stand generally, with the view and in order to enable the said James Marshall to renew his application to the said Justices, "the Court intimating that the Justices should have been aware that it was not open to them to refuse the certificate upon the grounds upon which same was on the former occasion refused."

I cannot for a moment accept the proposition that the Judges did not carefully consider the legal position when they thus communicated their views to the magistrates. They did so after argument, and had actually determined to attach the magistrates, the only difficulty being that raised by Lord Justice Barry that the title was not correct, that it should have been Justices of the county of Tyrone instead of certain named Justices.

This is what was done in 1877. The truth and reality of the case presents us with the same question to-day. We have again the factory, and the too great facilities for the purchase of spirits. *The Queen* (*Clitheroe*) v. *The Recorder of Dublin* (1) has been referred to. In my judgment in *The Queen* v. *The Justices of Cavan* (2) I stated we should not take upon ourselves to reverse in this Court the decision of our predecessors here. I offered no opinion on the merits of that case, or the soundness of the decision arrived at. I said if it was to be reviewed, it should be reviewed elsewhere.

But I do not think I am called upon by any consideration of *The Queen* (*Clitheroe*) v. *Recorder of Dublin* (1), if rightly decided, to make the expression "unsuitability of premises" bear a mean-

(1) Ir. R. 11 C. L. 412. (2) 30 L. R. Ir. 137.

ing which, in my opinion, it does not bear, and was never intended to bear. That expression, in my judgment, is confined to considerations affecting structure—structure in relation to proper accommodation for the public, in relation to the proper conduct of the business in the premises proposed to be licensed, and to considerations affecting site so far as it affects structural fitness upon the site, and access to the premises by the customers. For these reasons I think the conditional order should be made absolute; but as my brethren are of a different opinion it shall be discharged.

Solicitor for James Marshall: *T. H. Risk.*
Solicitor for the Justices: *T. C. Dickie.*

A. E. R. J.

PRATT, TENANT; VISCOUNT GORMANSTON, LANDLORD (1).

Land Com. 1894. Feb. 14, 16.

Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49)—*Lands used as part of demesne—Holding not within Act.*

Lands held under a yearly tenancy, and used as part of a demesne, *held*, under the circumstances of the case, not to constitute a holding to which the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), applied.

REHEARING of application by the tenant to have a fair rent fixed. A Sub-Commission had by order dated the 2nd November, 1893, determined the fair rent to be £30.

The holding consisted of 35A. 1R. 25P., part of the townland of Corratober, in the county of Meath, held under a yearly tenancy, at a rent of £40, the Poor Law Valuation being £18 15*s.*

The tenant Joseph Pratt held in fee the townland of Cabra, containing almost 600 acres, and situate in the county of Cavan. On this was a cottage called Cabra Cottage, formerly the family residence, now partly in ruins, and occupied by a caretaker. The

(1) Before BEWLEY, J., and FITZGERALD, Q.C., Commissioner.

Land Com. 1894.

PRATT, *Tenant*; GORMANSTON, *Landlord.*

tenant also held under lease for ever the adjoining lands of Cormey, also situate in the county of Cavan, containing nearly 350 acres, which had been purchased by his grandfather from the Foster family, and on which they had built a mansion, since the purchase occupied by the Pratt family, and now known as Cabra Castle.

Adjoining Cormey on the south side, and not far from Cabra Castle were parts of the lands of Drumgill and Barleyhill, held by Joseph Pratt under leases for lives perpetually renewable from the Shirley family. These parts of Drumgill and Barleyhill were separated from each other by the portion of Corratober forming the holding in question. This holding was partly wedge-shaped or triangular, its shortest side or apex being to the north, and adjoining Cormey between Drumgill and Barleyhill. Drumgill, Corratober, and Barleyhill were in the county of Meath. A county road ran through Drumgill in a north-easterly direction, thence for a short distance across the southern corner of Cormey, cutting off a small portion of that townland where it adjoined Corratober, and thence in an easterly direction through Barleyhill.

There was a wall round the greater portion of Cormey; none round the holding in question.

The evidence for the tenant went to show:—His father used the holding for grazing; it must have been tilled; the tenant did not use it, nor did his father, as far as he knew, otherwise than as an ordinary farm. He never heard of this holding as Cabra Demesne or Cormey Demesne; he used it for feeding store cattle, and as he used other farms; about 14 acres of it were planted with trees of the same character as those in the demesne, but the latter were much older; he was tenant for life of the other property; Corratober was not in settlement, but was in the occupation of the tenant as personal representative of his father: there were signs of tillage and drainage on it; he used Drumgill and Barleyhill as ordinary farms; he owned some 27,000 acres in Ireland.

Evidence was given for the landlord as follows:—The trees were like those in the demesne; they all made one continuous plantation; there was a gate-lodge beside the holding on Drum-

gill; all the lands held by Mr. Pratt were called Cabra demesne; the boundary separating Drumgill from Cormey was obliterated; there were 12½ acres (Irish) of pasture, and 9 acres of plantation in the holding; it joined Cabra Demesne, and was dovetailed into it.

The tenant had been abroad, and there was no evidence under what circumstances the holding in Corratober had been acquired by the Pratt family.

Dane, for the tenant:—

There has never yet been a decision that a farm held under a yearly tenancy becomes demesned by being taken by the owner of a demesne. Here the evidence shows that the holding was used as an ordinary farm. The Court of Appeal, several years ago, decided, in a case of *Fawcett* v. *Bloomfield* (1), that where portion of admittedly demesne lands was added to a portion of agricultural lands, and the whole was let as one holding, the agricultural lands did not thereby become demesned, and the rent attributable to the agricultural portion, as distinguished from the rent of the holding, being ascertainable, they remitted the case, in order that a fair rent might be fixed on the agricultural portion. In *Gerrard* v. *O'Farrell* (2) Fitz Gerald, Q.C., Commissioner, when County Court Judge of Meath, fixed the fair rent of a holding held under a yearly tenancy and through which ran the avenue of the tenant's demesne. In *Allen* v. *Grogan* (3) the facts were entirely different from those in the present case: there the rent reserved was a fancy one, very largely in excess of the agricultural value; the term was 999 years, and the land was taken for the express purpose of being incorporated with the demesne. In *Magner* v. *Hawkes* (4) Sir Peter O'Brien, C.J., lays it down (p. 297) that the tenure is an element to be taken into consideration in determining whether lands are demesne. It does not appear what the tenure was in *Grace* v. *O'Connor* (5), but the rent was in excess of the ordinary agricultural rent. That case was decided on the ground that the lands were not taken for any

(1) Not reported.
(2) Not reported.
(3) 32 L. R. Ir. 179.
(4) 32 L. R. Ir. 285.
(5) Not reported. Referred to in *Allen* v. *Grogan*, 32 L. R. Ir. 179, at page 185.

Land Com. 1894.

PRATT, *Tenant*; GORMANSTON, *Landlord.*

agricultural purpose, but as an adjunct to the demesne; and it is the only reported decision that lands so taken thereby cease to be within the operation of the Land Acts. *Burrowes* v. *Collis* (1) decided by the Land Commission was also different in its facts from the present case. There the tenant took the lands for a long tenure for the purpose of adding them to his demesne and at a rent largely above an agricultural rent.

Hackett, for the landlord, relied on *Allen* v. *Grogan* (2), and *Grace* v. *O'Connor* (3), and cited *Magner* v. *Hawkes* (4) to show that tenure in fee was not necessary in order that lands should be demesne.

Feb. 16.

BEWLEY, J.:—

In this case the holding consists of 35A. 1R. 25P. statute measure, and is situate in the county of Meath close to the borders of the county of Cavan. The tenant Mr. Pratt lives at Cabra Castle, quite near to the holding, but on the Cavan side of the boundary; and on the part of the landlord it is contended that the holding is demesne land, and as such excluded from the operation of the Land Acts. It appears that Mr. Pratt is the owner of very extensive estates in Meath and Cavan, and elsewhere in Ireland, stated to contain some 27,000 acres. I refer to this not for the purpose of suggesting that a wealthy landowner would not be entitled to the benefit of the Land Acts if he were tenant of a holding to which they applied, but to show that it is not unnatural that Mr. Pratt should be the owner of a large demesne. The ancestral home of the Pratt family was on the neighbouring townland of Cabra, but the house being small and old, and insufficient for their requirements, Mr. Pratt's grandfather bought from some member of the Foster family the adjoining townland of Cormey, and built thereon a handsome mansion-house, and laid out the lands as a demesne. The same Mr. Pratt also acquired certain freehold lands called Drumgill and Barleyhill, which lie south of Cormey, and also some interest in

(1) Not reported.
(2) 32 L. R. Ir. 179.
(3) Not reported. Referred to in *Allen* v. *Grogan*, 32 L. R. Ir. 179, at p. 185.
(4) 32 L. R. Ir. 285.

the holding in question, which is wedged in, so to speak, between these lands of Drumgill and Barleyhill.

In considering whether this is demesne land, I need not refer to any of the reported cases on the subject of demesne lands except *Magner* v. *Hawkes* (1). At one time it was thought that lands could not be demesne lands so as to be excluded from the operation of the Land Acts, unless they had at some period been the demesne of the landlord before the Court or his predecessors in title. But any doubt on this subject was removed by the decision in *Magner* v. *Hawkes* (1), which shows that lands may acquire the character of demesne from the acts of the lessee or tenant without any act of the landlord. In the course of his judgment in that case, Palles, C. B., says (p. 304):—"The main ground relied upon in support of this narrower construction is that a lease, such as that of 1752, for 990 years, negatives any intention by the lessor to resume occupation, and it is said that there are some expressions in the judgments in *Griffin* v. *Taylor* (2) which indicate that if the representatives of the lessor evicted the lessee and resumed possession, the lands could not be demesne *as against them*, and that therefore they cannot be demesne against anyone.

"I entirely concur in so much of this reasoning as insists that lands cannot be 'demesne' within the meaning of the Act, subjectively, and that if the holding is not 'demesne,' *quoad everyone*, it cannot be demesne at all; but I contest the prior step in the argument.

"The right to have a fair rent fixed is a right given to the tenant in occupation of such lands as, at the passing of the Act, answered a particular description; and although whether they answered that description must usually depend upon the acts of particular persons, the lands are, according to the nature of those acts, either brought within or excluded from the Act, not *quoad* those particular persons, but as to *all* persons having estates therein."

After referring to particular lettings he continues (p. 305):—

"So, too, of two tenants of a common head landlord, one may, and the other may not, have constituted his holding demesne, and

(1) 32 L. R. Ir. 285. (2) 16 L. R. Ir. 197.

Land Com. 1894.

PRATT, *Tenant*; GORMANSTON, *Landlord.*

Bewley, J.

then each may have sublet; in my view in such a case the sub-tenant of one might have no right, and the sub-tenant of the other might have a right under the Act against the common head landlord."

Again, in the same case, at page 300, referring to the case of *Moore* v. *Batt* (1), in the Court of Appeal, the Lord Chief Baron states that he there adopted the words of Sir Edward Sullivan, L. C., in *Griffin* v. *Taylor* (2): — "The true definition of demesne lands is lands held by the *owner* with the mansion-house."

If we apply this definition to this case we find that not only is Cormey occupied by the owner with the mansion-house, but that Drumgill, Barleyhill, and the lands in question are also; and on an inspection of the map and a consideration of the evidence of the valuers examined before us, it becomes manifest that whoever planted Drumgill, Cormey, and Barleyhill, also planted the present holding, some 19 acres of which only can possibly be called pastoral or agricultural, the remainder being ornamental plantations; in fact, this agricultural or pastoral portion is little more than an island of grass in the midst of a wood. The entire holding, so far as its physical character is concerned, has the appearance of demesne land; and that part of it which is capable of any profitable use is used for grazing in the same way as other portions of the demesne.

The lands being held along with the mansion-house and used in the same manner as the residue of the demesne, it appears to me to be immaterial whether Mr. Pratt holds under lease, or as tenant from year to year, or in fee-farm.

Drumgill obviously was actually incorporated with the demesne; portion of the boundary, which is not only the townland boundary but the boundary between the counties of Cavan and Meath, was obliterated, and these lands were thrown into Cormey; and though there is a small boundary stream between the holding in this case and Drumgill, the plantations run on continuously from one to the other.

We are of opinion, therefore, that the holding is demesne, and

(1) 32 L. R. Ir. 68. (2) 16 L. R. Ir. 202.

that the order of the Sub-Commission fixing a rent should be discharged, and the originating notice dismissed.

Land Com. 1894.

PRATT, *Tenant;* GORMANSTON *Landlord.*

Solicitor for the tenant: *T. Y. Chambers.*
Solicitor for the landlord: *Trevor T. L. Overend.*

D. M'C. M.

HOLLAND *v.* CHAMBERS (1).

(JOHN DOHERTY'S CASE.)

Appeal. 1893.

Nov. 9. Dec. 1, 13.

Parliamentary franchise—Occupation as tenant—Tenant dying intestate—Sole next-of-kin in occupation—Letters of administration.

On the death intestate of the tenant of a house who had left Ireland, his father, who was his sole next-of-kin, and had been residing in the house, continued in occupation during the qualifying year, and paid the rent, without taking out letters of administration:—

Held, that the father was entitled to be registered as an inhabitant householder.

After the expiration of the qualifying period the father took out letters of administration to his son:—

Held, that the letters did not relate back for the purposes of the franchise.

APPEAL by the objector Daniel Holland against the decision of the Recorder of Londonderry, declaring John Doherty entitled to a vote for the Borough of Londonderry as an inhabitant householder.

The facts appear from the case stated by the Recorder, which was as follows:—

"At a Court held in Londonderry, before me, the Recorder of Londonderry, for the Revision of the lists of voters for the Borough of Londonderry, on the 15th September, 1893, and following days, the following proceedings took place:—

"1. The name of John Doherty appeared on the Town Clerk's List, No. 17, for the West Division, of persons entitled to vote in

(2) Before SIR PETER O'BRIEN, C.J., PORTER, M.R., PALLES, C.B., and FITZ GIBBON and BARRY, L.JJ.

Appeal. 1893.

HOLLAND v. CHAMBERS.

the Election of a Member of Parliament for the said Borough of Londonderry, as follows:—

No.	Surname and Christian Name.	Place of Abode.	Nature of Qualification.	Name or Description of Premises.
374	DOHERTY, JOHN,	36, William-st. (without.)	Inhabitant Householder.	House, office, and yard, 36, William-st. (without.)

and was duly objected to.

"2. William Doherty, son of the claimant, had become tenant of the house, 36, William-street (without), some seven or eight years ago, and a Mr. M'Gonigal had at the same time become surety to the landlord for the due payment of the rent. William Doherty was a young man of no means, and his father (the claimant) lived in the same house. The son emigrated to America shortly after taking the house, and died there intestate and without having been married, on the 4th March, 1892, leaving his father his sole next-of-kin.

"3. John Doherty (the claimant) during the son's absence used the house as his own, and paid the rent for it out of his own resources. He several times sought to be made tenant, but the landlord required a notice of surrender, as he wished to keep his hold on the surety, and this surrender could not be got, the son's address being unknown.

"4. For the qualifying year from 20th July, 1892, to 20th July, 1893, John Doherty (the claimant) continued to inhabit the house as formerly, except that his son being dead he considered himself entitled as his sole next-of-kin. The house was of no value beyond the rent, and from the time his son went away to America the claimant had let parts of it to various persons who paid him rent, and he lived there all the time with his wife.

"5. In April, 1893, the surety found it necessary to collect the rents paid to the claimant by his lodgers or sub-tenants, and by mutual arrangement those living in the house under the claimant paid their rents direct to the surety, M'Gonigal, towards the head rent. It took half-a-crown a week in addition from the claimant to make up the rent for which the surety was responsible; and

accordingly the claimant paid this to the surety and the surety paid the total collection to the landlord and so kept himself safe.

"6. The claimant had as a matter of fact inhabited during the qualifying year the whole dwelling-house, and those to whom he sub-let are to be deemed his lodgers. He claimed for the house and had a second claim for part of the house, so that this point became immaterial, and it was agreed they should be considered his lodgers.

"7. The case came on for hearing and stood over at the request of the voter to enable him to make title to his son's tenancy by taking out letters of administration to him. Accordingly on 6th October, 1893, the claimant produced letters of administration, dated same day, to his son William Dóherty, described as having died intestate in the United States on 4th March, 1892. The letters were granted by the Probate Division to the claimant as father and sole next-of-kin of said William Doherty. The claimant contended that his inhabitancy as sole next-of-kin for the qualifying year was now made regular by the letters of administration. There was no evidence of assets of or debts due by the intestate.

"8. The objector contended that the claimant was no better than a trespasser, during the qualifying year, and the letters of administration, obtained after the Revision Court had been sitting a fortnight, could have no effect.

"9. I thought the inhabitancy was as tenant or owner, and admitted the claimant. If I was wrong in this his name should be struck out."

The appeal, which had been argued on November 9, 1893, was, by direction of the Court, re-argued on December 1, 1893.

Ross, Q.C., and *Cooke*, for the appellant :—

The letters of administration taken out on the 6th October, 1893, to William Doherty cannot relate back so as to give the claimant a title to the tenancy during the qualifying period. Following the analogy of a claim to be rated the very latest date when the legal title of the claimant should be complete would be the first day of the Revision Sessions, *i.e.* 15th September, 1893 : *O'Hagan* v. *Colquhoun* (1). The rule is that the letters of admini-

(1) 20 L. R. Ir. 384.

Appeal. 1893. HOLLAND v. CHAMBERS.

stration relate back to the death of the intestate only for the benefit of the estate: Williams on Executors, vol. i. p. 411; *Morgan* v. *Thomas* (1). They cannot relate back for the purpose of giving the claimant a capacity which he did not possess when the Revision Sessions opened.

[SIR PETER O'BRIEN, C.J.: The question we wish you to argue is, whether John Doherty, who was sole next-of-kin of the deceased tenant, and who inhabited the qualifying premises for the entire qualifying year, occupied these premises as tenant. We are all clear that the letters of administration did not relate back.]

John Doherty was not in occupation as tenant: the landlord refused to accept him: *M'Gee's Case* (2). The facts of that case are the same as the facts of this, except that the claimant here is sole next-of-kin, while in *M'Gee's Case* (2) the claimant had his sister living with him; but as the sister consented to his being made tenant, her presence makes no difference between the two cases.

No doubt it is said, in Rogers on Registration (p. 77), that any lawful occupation is sufficient: but this proposition is not borne out by the cases cited: *M'Loughlin's Case* (3) alone deals with the point, and it is a very blind case: it does not appear from the statement of facts whether the claimant there was accepted as tenant by the landlord. It is plain, however, that the landlord had not refused to accept him; so that case is distinguishable from the present. In every case where the claimant being one of the next-of-kin of a deceased tenant, and being in occupation of qualifying premises, has been held qualified for a vote, it will be found that he was treated as tenant by the landlord: *Fowler* v. *Hanrahan* (*Carruther's Case*) (4), *Leonard* v. *M'Cann* (5). The rent here was paid for at least part of the qualifying period by the surety and not by the claimant.

Sullivan, *Q.C.*, and *Healy*, for the respondent:—

The acceptance or refusal of John Doherty as tenant by the landlord has nothing to say to the case: he was the sole beneficial

(1) 8 Exch. 302.
(2) Lawson, Notes, 1890–91, p. 12.
(3) Ale. R. C. R. 249.
(4) Lawson, Notes, 1888–89, p. 10.
(5) *Ibid.* p. 11.

owner of the tenancy: *Hamill* v. *Murphy* (1), *Cooper* v. *Cooper* (2); as such, he was in sole occupation, and was therefore entitled to a vote without taking out administration at all.

Appeal. 1893. HOLLAND v. CHAMBERS.

At the conclusion of the argument the COURT intimated that the case would be sent back to the Recorder to state whether there was any refusal by the landlord to accept John Doherty as tenant after the death of William Doherty.

The Recorder answered this question in the negative.

Cur. adv. vult.

SIR PETER O'BRIEN, C. J.:—

Dec. 13.

The facts of this case are set out as succinctly as they can be stated in the case which has been reserved for our determination. They are as follows. [His Lordship read the case.] A controversy arose on the argument of the case as to whether there was, after the death of the son William Doherty, a refusal by the landlord to accept the father as tenant: the case was sent back to the Recorder to make this matter clear, and he has told us there was no such refusal after the death of William Doherty. We may therefore consider the case independently of *M'Gee's Case* (3), as the facts of both cases are different. Now, the Recorder seems to have thought that the grant of administration which was obtained after the case had been brought forward in Court —the consideration of the case having been adjourned to enable them to be procured—so related back as to substantiate a claim which without such letters was invalid. We are all of opinion that the letters of administration could by relation back have no such effect. Indeed, on the re-argument of the case, Mr. Sullivan did not lay much stress on this matter of relation back, but he contended that, under the circumstances of this particular case, the father, as the sole next-of-kin of his son, was equitable tenant during the qualifying period, and that as he occupied as such his title to the franchise was established. I accept Mr. Sullivan's argument as well founded. He cited *Hamill* v. *Murphy* (1): that case was mainly founded on *Cooper* v. *Cooper* (2). In the latter case there was a very elaborate disquisition as to the interests of

(1) 12 L. R. Ir. 400. (2) L. R. 7 H. L. 53. (3) Lawson, Notes, 1890-1, p. 12.

Appeal. 1893. HOLLAND v. CHAMBERS. Sir P. O'Brien, C.J.

the next-of-kin in the assets of an intestate, and as to the effect of the Statute of Distributions. In his judgment Lord Cairns says (at p. 64) :—"My Lords, it was very much pressed on your Lordships, in the extremely able argument we heard at the bar from the counsel for the appellants, that the interests of a next-of-kin in the estate of an intestate is an undefined and intangible interest, that it is a right merely to have the estate converted into money, and to receive a payment in money after the debts and expenses are discharged. My Lords, no doubt the right of a next-of-kin is a right which can only be asserted by calling upon the administrator to perform his duty, and the performance of the duty of the administrator may require the conversion of the estate into money, for the purpose of paying debts and legacies. But I apprehend that the rule of law, or the rule laid down by the statute, which requires the conversion of an intestate's estate into money, is a rule introduced simply for the benefit of creditors and for the facility of division. For the benefit of creditors and for the facility of division amongst the next-of-kin, the estate is to be turned into money, but as regards substantial proprietorship, the right of the next-of-kin remains clear to every item forming the personal estate of the intestate, subject only to those paramount claims of creditors." And again he says (p. 66) :—"If we look on the Statute of Distributions, as I think we ought to look on it, as in substance nothing more than a will made by the Legislature for the intestate, and liken this to the case of a person having made a will, and having directed his debts and expenses to be paid, and having given over his clear residue to his three children and his widow—if (I say) we look at the case as if it had assumed these features, I apprehend your Lordships will be perfectly clear that the residuary legatees under such a will had a clear and tangible interest *in specie* in the Pain's Hill estate, just in the same way as the youngest of the three brothers, Frederick John, who directly took one-third of the proceeds of the estate." And Lord Hatherley in the same case says (p. 72) :—"Yet I take it that whether it was a term of years, whether it was the produce of a sale, or whether it was any other specific chattel belonging to the intestate's estate, if there was a sole next-of-kin, he could by paying the debts of the intestate and satisfying the funeral and testamentary expenses,

require that that property should not be sold and disposed of, and it would then become his own entirely and absolutely, in possession." Now, such is the language of Lord Hatherley. In this case there is no evidence of debts, and the claimant is sole next-of-kin; but independently of the question of evidence of debts, I think Lord Cairns and Lord Hatherley were of opinion that the next-of-kin have a distinct interest *in specie* in the chattels of an intestate, whether a term for years or mere goods—that is to say an equitable interest in the subject-matter *in specie*, though the subject-matter may be liable to debts. Now, as the claimant was sole next-of-kin, the entire equitable interest was in him. I am therefore of opinion that he was sole equitable tenant, and that as he occupied as such during the qualifying period his claim to the franchise is established.

I give my opinion, as I said before, wholly independently of *M'Gee's Case* (1). Its consideration is not involved here. I give it independently also of the passage in Rogers, p. 77, that was referred to, and also of *M'Loughlin's Case* (2). The passage in Rogers and *M'Loughlin's Case* (2) were cited in support of the proposition that if there be a tenancy of a particular holding and a man in occupation of that holding, though not the tenant, and though not adopted or recognised in any way by the landlord as tenant, or in any way treated as such, he is entitled to the vote if he is lawfully on the premises. When a case depends upon the soundness or unsoundness of that proposition, the principles of law and the language of the Franchise Acts must be considered and the authorities reviewed. We will then have to consider whether the cases cited in Rogers are relevant, whether *M'Loughlin's Case* (2) though, no doubt, decided by eminent Judges, can, as reported, afford any light in reference to the proposition for which it was cited, or whether it is, as it was designated both by Mr. Sullivan and Mr. Ross, so far as relates to that proposition, a blind case. When this question arises, sufficient for that hour will be the evil thereof. On the present occasion sufficient is so much as enables us to decide the question submitted for our determination without embarking on

(1) Lawson Notes, 1890-91, p. 12. (2) Ale R. C. R. 249.

Appeal. 1893.

HOLLAND v. CHAMBERS.

disquisitions which are now unnecessary and might in the future prove embarrassing.

PORTER, M. R. :—

I am of the same opinion, and for very much the same reasons as those given by the Lord Chief Justice. When the case was first argued it seems to have been assumed that there was a refusal on the part of the landlord to accept John Doherty as tenant of the qualifying premises after the death of William Doherty. I was not present at that argument; but it appears now expressly from the supplemental statement of the learned Recorder that there was no such refusal in fact, and really the case as originally stated does not (I think) give much colour for the suggestion that there was any refusal to accept the claimant as tenant, except that refusal which the landlord was bound to give, and which was while the son was still alive, though absent in America, and the owner of an unsurrendered tenancy in the qualifying premises. During the son's absence the claimant was in possession of these premises, and after his son's death remained on there, and, as I gather from the case, paid the rent during the whole period he was in possession, either himself out of the rents paid him by the sub-tenants or else by M'Gonigal, who was a surety. The case is therefore quite different from *M'Gee's Case* (1), where the landlord had refused to take the claimant as his tenant. The case is also free from a complication that has arisen in other cases argued before us where on the death of the tenant of premises a question has sprung up whether the person claiming the franchise as tenant of those premises has been in sole occupation. Here no one except the claimant was in occupation at all: no one except the claimant had any claim to the premises of which he was in occupation; for, on the findings, the lodgers may be disregarded. The only question is, was his occupation "as tenant"? It was argued that it was not because he had not taken out administration to his son, the late tenant, during the qualifying period, and that therefore the claimant's occupation was only as a trespasser or, at least, otherwise than as tenant.

(1) Lawson, Notes, 1890-91, p. 12.

I do not think that the words "as tenant" necessarily mean that the voter should be owner of a legal tenancy. It may be that even where there are two persons one of whom is owner of the legal estate in a tenancy, say, from year to year, and the other the owner of the equitable interest in it, an occupation by the latter may be an occupation "as tenant" within the Act: as, for instance, the case of a mortgagor and mortgagee, where a legal tenant may have mortgaged his tenancy so as to vest it in the mortgagee while himself remaining in possession. However, I do not decide that question. Here there are not two persons to be considered but one only, for the claimant is entitled in equity as sole next-of-kin to the whole interest of the deceased tenant in the premises: he is in occupation as such sole next-of-kin, and can remain there until displaced by a better title: no other person has any claim to the tenancy, and the claimant is in occupation under circumstances in which any one not dealing with strict legal definitions would have no hesitation in describing him as the tenant.

What is the position of a next-of-kin under the Statute of Distributions before administration? The Lord Chief Justice has referred to *Cooper* v. *Cooper* (1). In that case the question did not directly arise. The judgments turn on a subject bearing on a question of election, having no special reference to the absence of a grant of letters of administration. But the case is instructive in reference to the rights of the next-of-kin, whether a grant of letters of administration has or has not been made. In addition to the passages cited by the Lord Chief Justice, I will read one other short extract, which has a bearing on the point before us. In that case there had been during the argument some discussion as to the position of a creditor of the deceased as contrasted with that of the next-of-kin. In his judgment, Lord Cairns, refers to this, and says (at p. 66):—"My Lords, I apprehend the two cases are quite distinct; and I would suggest to your Lordships a test which will at once show the difference between them. Can any person doubt but that one of these next-of-kin might, before the administration of the estate of the intestate, have released to

(1) L. R. 7 H. L. 53.

Appeal. 1893. HOLLAND v. CHAMBERS. Porter, M.R.

another next-of-kin, or have assigned to a third party, his interest in any specific portion of the estate of the intestate, in any specific item of the estate of the intestate, subject only to that item bearing its share of the administration expenses? I apprehend it to be quite clear that the next-of-kin could take that course. But, my Lords, could a creditor do so? Could a creditor, before payment of his debt, say, I will release to you or I will assign to you my interest in such an item of the estate of the intestate? Clearly a creditor could do nothing of the kind. He is a person who has no interest whatever in any specific portion of the estate of the intestate. He has a personal claim merely for the payment of his debt, to which effect might be given, and would no doubt be given in the proper court, by securing the assets, and obtaining payment for him out of the assets." Taking this passage along with those which the Lord Chief Justice read, and also another which embodies a quotation from Bacon's Abridgment to the effect that the next-of-kin are in a position analogous to that of persons claiming under a will, I think that next-of-kin must be taken to have an interest in the estate of the intestate which may be termed specific and tangible. We may therefore compare the voter in this case to a specific legatee or devisee in actual possession of the deceased's estate under an unproved will of which he himself is named sole executor. The moment administration is taken out, there being no debts, so far as is found, the administrator would be a trustee for him. I think, therefore, it is not too much to say that the claimant was equitably the owner of an existing tenancy not vested at law in any one else at the time. But I guard myself strictly by saying that I am dealing only with the question in this case as to the franchise—turning on the words of the statute—and deciding only that this man was in occupation "as tenant or owner," and not questioning in any degree such cases as *Doe* v. *Glenn* (1), and *Metters* v. *Brown* (2) as to the effect of acts by administrators, before obtaining letters.

(1) 1 A. & E. 49. (2) 1 H. & C. 686.

PALLES, C.B. :—

It follows from the passages which have been read from the judgments in the House of Lords in *Cooper* v. *Cooper* (1) that the estate which, before administration, a sole next-of-kin has, by reason of the Statute of Distributions, in a chattel term of the intestate, must necessarily be of the same character as that of a *cestui que trust*, entitled to the entire beneficial interest in a term, subject to a trust to raise debts and expenses. Occupation under such a trust of a term, subject to the payment of a rent, would, if created by deed or will, clearly be "*as tenant*," within the meaning of the 13 & 14 Vict. c. 69; and not the less so because the estate was equitable only, the statute in express terms giving a right to vote to an equitable tenant in possession. Upon that short ground, I am, and from the commencement of the argument was, clearly of opinion that the claimant here is entitled to the franchise.

What I have said shows that I should have arrived at the same conclusion had the case not been sent back for amendment, and that my decision is entirely irrespective of the facts mentioned in the supplemental statement. The importance attached by some members of the Court to the fact of there not having been, after the death of the former tenant, a refusal by the landlord to accept the claimant as tenant, is, I apprehend, for the purpose of distinguishing this case from *M'Gee's Case* (2). Now, in my opinion, even had there been such a refusal, the case would not be in opposition to *M'Gee's Case* (2), as a *decision:* and it is the decision only, as distinguished from the expressions used by the individual Judges, which binds us. Before *M'Gee's Case* (2) there had been a number of decisions in which, when several next-of-kin were in possession, and no personal representative had been raised, a distinction had been drawn between a case in which one of such next-of-kin had been, with the consent of the others, accepted by the landlord as tenant, and cases in which there had been no such acceptance. In those cases it was held that the claimant who had been accepted with such consent was entitled to the franchise, as the character of his occupation was to be deemed to have been changed, and his subsequent occupation was, as matter of law, to be

(1) L. R. 7 H. L. 53. (2) Lawson, Notes, 1890–1, p. 12.

Appeal. 1893. HOLLAND v. CHAMBERS. Palles, C.B.

attributed to the landlord's recognition of him as tenant. As I read *M'Gee's Case* (1), the attempt there was to have the same principle applied to a case in which there was no acceptance by the landlord of the claimant as tenant; and it was sought to be so applied because the only other next-of-kin in possession was produced as a witness and said that she made no claim. Still, however, more than one next-of-kin was in actual possession, and there was no greater or other estate, either by estoppel or otherwise, in one of those in possession than there was in each of the others. As I read the decision there, it did no more than refuse to extend to such a case the principle previously applied to a state of facts wholly different.

FITZ GIBBON, L.J.:—

In my opinion John Doherty is entitled to the franchise as an inhabitant householder. The only question is whether he inhabited the qualifying premises "*as tenant.*" As the landlord refused the claimant's application to be made tenant, and William Doherty's tenancy never was surrendered, and the rent payable under it has been paid throughout, I think no relation of landlord and tenant was ever created between the landlord and John Doherty in his own right. Therefore, unless John Doherty occupied under his son's tenancy, he did not occupy as tenant at all. William Doherty's tenancy continued and was outstanding, but with no complete title in anyone until the claimant took out the letters of administration. I am satisfied that the grant of administration did not operate, by relation, so as in any way to alter the character of the claimant's previous occupation. The question therefore resolves itself into this—Whether the sole next-of-kin of the deceased tenant of a chattel term, actually occupying the premises in his right as next-of-kin, occupies "as tenant" within the meaning of the Franchise Acts. In my opinion he does. I cannot call him an "equitable tenant." That phrase conveys no definite legal meaning to my mind: his title may be incomplete, but there is only one tenancy in existence: his occupation is actual and beneficial, and his rights are in no sense peculiarly equitable, especially in Ireland, where Deasy's Act (23 & 24 Vict.

(1) Lawson, Notes, 1890-91, p. 12.

c. 154, s. 3) enacts that the relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service. The right to the tenancy is, as Lord Cairns says, a tangible thing *in specie*. Here the landlord insisted on the contract of tenancy made with William Doherty: he held the claimant and the surety to it, the surety, to save himself, collected the lodgers' rents, and took half-a-crown a week more from the claimant, and so made up the rent payable under William Doherty's tenancy. The case finds that the claimant "continued to inhabit the house," that he "considered himself entitled as his son's sole next-of-kin," and he was answerable to the landlord as tenant, either as *executor de son tort* or in use and occupation. No one could evict him, he could rely on the outstanding tenancy, and both the landlord and the occupier were bound by and in privity with this tenancy. Under these circumstances, I entertain no doubt that the claimant's occupation was an occupation *as tenant*, and entitled him to the franchise.

I may add that everyone of the numerous cases in which occupation by several next-of-kin, without administration, has been held to disentitle any one of them to the franchise appears to me to be an authority, *e converso*, to show that such occupation when enjoyed by a single individual is sufficient to confer it. *Edward M'Gee's Case* (1) seems to me to have no application. From Mr. De Versan's note of that case it will be seen that my judgment commenced with the statement, "There is an outstanding tenancy." The consent of the other next-of-kin, before administration, could not vest that outstanding tenancy against the will of the landlord, and he had refused to accept the claimant as sole tenant. Where we have treated the consent of next-of-kin as material, it has been so treated because it was a consent to the creation of a new tenancy, and was therefore evidence of a surrender of the old one. The occupation which in this case qualifies the claimant is, in my opinion, his occupation by virtue of his right to enjoy the benefit of a subsisting tenancy, as sole next-of-kin. The landlord could not defeat this right: he could not refuse to recognise it. A refusal to accept John Doherty as tenant, even after his son's

(1) Lawson's Notes, 1890-91, p. 12.

Appeal. 1893. HOLLAND v. CHAMBERS.

death, could have no effect upon the son's outstanding tenancy. That tenancy did not require the consent of any other person to give it full effect, and as a matter of fact the rent was paid, and the premises were held and occupied under it.

BARRY, L. J. :—

I concur with the other members of the Court in thinking that this man is entitled to a vote. When this case was originally argued it was argued upon the hypothesis that the refusal of the landlord to accept the claimant as tenant took place after his son's death. But on the re-argument it was pointed out, I believe by the Master of the Rolls, that the language of the case as stated did not clearly convey, as was assumed in the argument, that the landlord had refused to accept the father as tenant except during his son's lifetime. The case was then sent back to the learned Recorder, with a request that he would state whether there had been any such refusal after the son's death. The Recorder has complied with this request, and has stated that the only refusal on the landlord's part to accept John Doherty as his tenant was made during the life of the son William Doherty. But it appears now that the only refusal by the landlord to accept John Doherty as tenant of the qualifying premises was a refusal made while the tenancy in those premises was outstanding in a living person, the claimant's son. The case is accordingly reduced to this :—The tenant of the qualifying premises died intestate ; while the deceased man's tenancy was still outstanding, the claimant, who was his sole next-of-kin, without taking out administration, entered into possession of the premises, paid the rent, and occupied during the qualifying period. I think, under these circumstances, the occupation of the claimant was occupation "as tenant" within the meaning of the Franchise Acts.

Solicitor for the appellant : *W. L. Gilliland.*
Solicitor for the respondent : *J. E. O'Doherty.*

G. Y. D.

GORMLEY *v.* BUCHANAN (1).

Appeal.
1893.
Nov. 13.
Dec. 1, 13.

Parliamentary franchise—Rated occupier—Occupation as tenant—Father of claimant dying intestate—Claimant accepted as tenant—Consent of other next-of-kin—Joint or sole occupation.

The claimant's father had been tenant from year to year of the qualifying premises. He died intestate, leaving his widow and one son (the claimant) sole next-of-kin. The widow and the claimant continued to live on the farm during the qualifying period. The claimant had been accepted by the landlord as tenant. The Revising Barrister, on these facts being proved, allowed the case to stand for the attendance of the widow to prove that she had released her claim on the farm. She did not attend, and the Revising Barrister disallowed the vote, on the ground that the claimant was not in sole occupation :—

Held (*diss.* FitzGibbon, L.J.), that there was evidence to support the finding of the Revising Barrister, and that his decision should be affirmed.

APPEAL by Peter Gormley against the decision of Mr. Cuming, one of the Revising Barristers for the North Tyrone Division, refusing to admit the appellant to the franchise. The facts appear from the case stated, which was as follows :—

"At a Court held in the said Division of the said county, by me, one of the Revising Barristers appointed to revise the lists of voters for the said Division and county, the name of the appellant, Peter Gormley, appeared on the Supplemental List of rated occupiers for the Drumquin Polling District of the said Division, and was duly objected to.

"It was proved that his father died two years ago, leaving this son and a widow. The appellant was accepted as tenant on the father's death. The valuation of the farm is £13 15*s*. There was no evidence given or offered that the father had made a will. The widow lives on these premises since the death with the appellant. The father was tenant from year to year.

(1) Before SIR PETER O'BRIEN, C.J., PORTER, M.R., PALLES, C.B., and FITZGIBBON and BARRY, L.JJ.

Appeal. 1893.

GORMLEY v. BUCHANAN.

"Case stands adjourned by me for attendance of widow, to prove that she had released or abandoned her claim on or interest in the farm. She does not attend.

"I struck out his name, holding that he was not the sole occupier or entitled to a vote.

"If I am wrong in this, his name is to be restored to the said list as a voter, otherwise to remain out."

Healy, and *M. J. Kenny*, for the appellant:—

The claimant was accepted by the landlord as the tenant; he has been treated as tenant, he was in occupation during the qualifying period as tenant, no one else has set up any claim to the holding or the tenancy: *Fowler* v. *Hanrahan* (1), *Leonard* v. *M'Cann* (2), *Torish* v. *Sproule* (3), *Kirkpatrick* v. *Murphy* (4). In all former cases where one of the next-of-kin of a deceased tenant, accepted as tenant by the landlord, was held not entitled to a vote, the absence of consent by the other occupying next-of-kin was affirmatively proved. It lies on the objector to show that the other next-of-kin did not consent; that *onus* has not been satisfied here, the claimant's mother is not tenant: the claimant is the only person in occupation as tenant; it is a rated occupier's claim, and the claimant has paid the rates.

Ross, Q.C., for the respondent:—

There was evidence that the widow of the deceased tenant had some interest in the farm, and that she was there in occupation to sustain it.

The *onus* lay on the claimant to prove that he was in sole occupation as tenant; to discharge this *onus* he should have proved that his mother had by agreement waived all claim to the tenancy of his father. It lay on him to prove her consent to the landlord taking him as tenant.

In *Fowler* v. *Hanrahan* (1) the Revising Barrister found that all the next-of-kin consented. In *Leonard* v. *M'Cann* (2) all the next-of-kin were out of possession.

(1) Lawson, Notes, 1888-89, p. 10.
(2) *Ibid.* p. 12.
(3) Lawson, Notes, 1891-92, p. 12.
(4) *Ibid.* 1890-91, p. 13.

Appeal. 1893. GORMLEY v. BUCHANAN.

The appeal, which had been argued on November 13, 1893, was, by direction of the COURT, re-argued on December 1, 1893. On the re-argument, counsel for the appellants said that the appeal was not sustainable, while counsel for the respondents said that he thought the Revising Barrister's decision was wrong.

Cur. adv. vult.

Dec. 13.

SIR PETER O'BRIEN, C.J. :—

A man named Gormley held a farm, as tenant from year to year. He died about two years ago. There was no evidence that he made a will, and the case has been argued on the basis that he died intestate. His son, who claims to be entitled to the franchise, was accepted as tenant by the landlord. The widow, the mother of the claimant, resided on the premises. When so much was proved before the Revising Barrister the case was adjourned for the attendance of the widow to prove that she had released or abandoned her claim to her interest in the farm. She did not attend. The Revising Barrister disallowed the vote, holding that the claimant was not the sole occupier. I think that there was evidence to sustain his finding, and that his decision must therefore be affirmed. The case seems to me to be substantially governed by *Smyth* v. *Chambers* (1), and *Simpson* v. *Hanrahan* (2), both of which I consider rightly decided. If a man dies intestate leaving several next-of-kin, and one son is accepted as tenant with the consent of the other next-of-kin, if they consent that the tenancy is to be in the son so accepted alone, and that consent be established in proof, I think that a finding that the tenant so accepted was in sole occupation, though the other next-of-kin were physically present on the premises, would be sustainable; but in the present case no such consent was proved. The widow clearly had, within the doctrine of *Cooper* v. *Cooper* (3) in the House of Lords, a specific interest in the holding. She had an interest *in specie*, and as the evidence did not show that she had abandoned or

(1) Lawson, Notes, 1885-6, pp. 10, 85.
(2) Lawson, Notes, 1892-3, p. 10.
(3) L. R. 7 H. L. 53.

Appeal. 1893.

GORMLEY v. BUCHANAN.

Sir P. O'Brien, C.J.

released her right to occupy in respect of this interest, I think the Revising Barrister was justified in finding that the claimant was not the sole occupier.

It is said *Carruthers' Case—Fowler* v. *Hanrahan* (1) conflicts with the view I have taken. In my opinion it does not. In that case it was found that it was with the consent of the other next-of-kin that the voter got his name put into the books as tenant, and that they all continued to acquiesce in that arrangement; and the Revising Barrister found that the claimant was in sole occupation. Here no such consent is proved, and the finding is that the claimant was not in sole occupation. Nor does our decision in this case conflict with *Leonard* v. *M'Cann* (2) where none of the other next-of-kin were in actual occupation, and the Revising Barrister found a sole occupation in the claimant. Nor does our decision conflict with *Glendinning's Case—Glendining* v. *Chambers* (3), nor *Bradley* v. *Chambers* (4), which were decided last year, where the claimant had a strictly legal tenancy, and the occupation was attracted by and referable only to that strict legal tenancy. There is no doubt that in the case of *Kilpatrick* v. *Murphy* (5), where a lunatic sister actually resided on the premises, it was held that though she was incapable of consenting the claimant was entitled to the franchise. I ventured at the time to dissent from that decision; and perhaps that case and *Torish* v. *Sproule* (6), the case of the minors, which was decided on its authority, may be supported on their special facts.

I am, however, clearly of opinion that there is in this case evidence to support the finding of the Revising Barrister, that the claimant was not in sole occupation. It was assumed that the claimant was the only person in occupation as tenant, that he was the only tenant in occupation, and that he should therefore have the vote. The first section of the Act of 1850 deals with the case of a single person as owner or tenant and occupation of that one person. This appears to me to mean sole occupation by that person as distinguished from joint occupation under section six of the same Act, and I cannot consider a person in sole occupation,

(1) Lawson, Notes, 1888-9, p. 10.
(2) *Ibid.* p. 11.
(3) Lawson, Notes, 1892-3, p. 43.
(4) Lawson, Notes, 1892-3, p. 47.
(5) Lawson, Notes, 1890-1, p. 13.
(6) Lawson, Notes, 1891-92, p. 12.

whilst there is another in actual occupation, who cannot be deprived of that actual occupation by the person who claims to occupy solely. There cannot in my opinion be sole occupation in one person whilst there is in another, who is in actual occupation, a right to remain in such actual occupation as against that one person.

The decision of the Revising Barrister must accordingly be affirmed.

PORTER, M. R. :—

I am of the same opinion. The question in this case is one of fact—to be determined, no doubt, upon proper evidence, and in accordance with legal principles, but still one of fact only, and therefore to be decided by the Revising Barrister: and this question of fact is whether the claimant was in sole occupation of the qualifying premises as tenant. That he was in occupation as tenant is plain. The question is, was he in *sole* occupation as tenant. His occupation was shared by his mother in some way or other. She had, apart from his having been accepted as tenant by the landlord, an interest in this farm of precisely the same kind as his own. If she had procured herself to be accepted as tenant she would have had as good a title to the farm as the claimant now has. Prior to his being accepted as tenant the claimant and his mother had rights to the tenancy of precisely the same character, the only difference being that he was entitled to two-thirds and she to one-third of the deceased tenant's interest. She has not (so far as I can learn from the evidence) renounced or parted with her rights in any way: on the contrary, she remains in some sort of occupation of the farm. Under these circumstances the Revising Barrister has found as a matter of fact that the claimant is not in sole occupation. All we have to do is to see whether this finding is so far wrong that there is no evidence to support it. If there be evidence tending both ways it is for the Revising Barrister to say to which side the weight of evidence inclines, and to find the facts. Here there plainly was evidence to support his finding. Probably, had I to decide the question on the evidence, I should have come to the same conclusion myself. I do not think this case is distinguishable on any legal ground

Appeal. 1893.

GORMLEY v. BUCHANAN.

Porter, M.R.

from *Simpson* v. *Hanrahan* (1). The facts there, no doubt, differ from those in the case before us, as the facts of one case always do from those of another. There the claimant's father died intestate fifteen years before the hearing of the case in 1892; he left a widow, three sons, including the claimant, and three daughters, his next-of-kin, in occupation of the farm. The widow paid the rent, and got the receipts in her own name from the time of her husband's death down to 1886. At this latter date the landlord accepted the claimant as tenant. His brothers and two of his sisters had left the farm; but down to and during the qualifying period his mother and one sister continued to live and were supported out of the farm in the same way as they were prior to 1886. Under these circumstances the Revising Barrister held that the claimant was not in sole occupation, and that finding was affirmed by this Court.

I think it is to be regretted that minute differences should be relied upon for the purpose of distinguishing cases where the main facts are identical. The lapse of time may be important in a case where it amounts to a bar under the Statute of Limitations, or where it throws light on the nature of the occupation: otherwise I do not think it need be taken into account.

On the whole, I am of opinion that there was evidence to support the finding of the Revising Barrister, and his decision must be upheld.

PALLES, C. B.:—

The appellant's claim is as rated occupier of a farm of which his father was, until his death two years since, in occupation as tenant from year to year. From the father's death the appellant and his mother lived together upon the farm. He was accepted as sole tenant by the landlord, but whether with or without the assent of his mother was not proved. The Revising Barrister held that the appellant was not the sole occupier, and struck out his name. As he is the sole tribunal competent to draw inferences of fact, his decision must stand, unless from the facts

(1) Lawson, Notes, 1892-93, p. 10.

found by him it follows, as matter of law, that the appellant was in sole occupation as tenant, that is, 1, that he was in sole occupation; 2, that such occupation was as tenant.

Does it follow from the facts found that he was in sole occupation? Were it not for his acceptance as sole tenant by the landlord the case would be similar to, and ruled by, *Smyth* v. *Chambers* (1) and *Simpson* v. *Hanrahan* (2). In such a case even if the inference of fact, that the sole occupation was in the son, were drawn by the Revising Barrister, it would be reversed as unsupported by the evidence: *Doonan's Case* (3). Until the acceptance as tenant of the son, the occupation was admittedly joint. The claimant alleges that this joint occupation by the two was changed into his sole occupation. The only fact he relies on as effecting this change is his acceptance as sole tenant. Does it result from this alone that the subsequent occupation must be deemed that of him solely? This, again, is covered by authority. It has been held that this result cannot follow from such acceptance as tenant, unless there has been a consent by all the other persons in occupation to his being constituted sole tenant. In another case standing for judgment to-day, *Brown's Case* (4), it may be necessary for me to consider the nature of such a consent. That is not material in the present case. Here it is sufficient to say that some consent is necessary, that consent is a matter of fact, and must be found as a fact, and that there is no such finding here. The only cases in which consent by each of the parties in occupation was not deemed essential were two, in each of which the non-assenting persons were under disability, viz. either lunatic (*Kirkpatrick* v. *Murphy* (5)) or under age (*Torish* v. *Sproule* (6)). Each of those cases was decided upon its special circumstances, and I need not refer to them, as it is immaterial here whether the decisions were right.

Everything which I have said to this is substantially admitted; but two matters are relied on for the appellant as distinguishing the present case from those heretofore decided:—

(1) Lawson, Notes, 1885-6, pp. 10, 85.
(2) Lawson, Notes, 1892-3, p. 10.
(3) Lawson, Notes, 1890-1, p. 14.
(4) [1894] 2 Ir. R. 318.
(5) Lawson, Notes, 1890-1, p. 13.
(6) Lawson, Notes, 1891-2, p. 12.

Appeal. 1893.

GORMLEY v. BUCHANAN.

Palles, C.B.

1. It is said that in the former cases absence of consent was affirmatively proved, and that where there has been an acceptance as sole tenant of one of those in occupation, the consent of the others is, in the absence of evidence, to be presumed, and that it lies on the objector to prove, if the fact be so, that they did not assent.

2. That even were there no consent, and if for that reason both mother and son are to be deemed to be in occupation, yet, as the mother is not tenant, the son is the only person in occupation as tenant, and therefore he is in such occupation as to bring him within 13 & 14 Vict. c. 69, s. 1.

As to the first of these matters I hold that it lies on the person alleging the consent to prove it. The mere weight of the evidence given in support of any particular proposition of fact cannot shift the *onus* of proof.

As to the second, I think that the occupation required by 13 & 14 Vict. c. 69, s. 1, is sole occupation in fact, in contradistinction to the joint occupation, which is the subject-matter of sect. 6; and I cannot hold that the claimant is in sole occupation of that of which his mother has the same actual occupation, unless he shows a good title to that sole occupation as against his mother. This good title is not conferred on him by his acceptance as sole tenant by the landlord without the consent of the mother. Whether we deal with the actual occupation, *per se*, or attribute the occupation to the claim of such of those in occupation as would have been entitled, under the Statute of Distributions if the deceased had died intestate, that actual occupation is joint, and the mere agreement of the landlord and the son not concurred in by the mother, and unaccompanied by any actual change of occupation, cannot oust the latter from such occupation as she previously had. It was competent, therefore, to the Revising Barrister to decide, as he has, that the occupation after the agreement was, as it previously had been, that of the mother and son jointly.

I have to add that, having regard to section 22 of the Land Law (Ireland) Act, 1881, it is impossible to hold that the so-called acceptance of the son as tenant created a new tenancy, even by estoppel, as might have been its effect before that statute. So far

as regards the right to the franchise, that acceptance, unaccompanied, as it has been been by sole occupation, appears to me to be wholly inoperative.

The decision should, in my opinion, be affirmed.

FITZ GIBBON, L. J. :—

In my opinion, upon the facts stated in this case, Peter Gormley is entitled to the franchise as a rated occupier. The facts, as distinguished from the Revising Barrister's inference from the evidence, are as follows :—The claimant's father was tenant from year to year, and died apparently intestate two years ago, leaving a son (the claimant) and a widow. The son was accepted as tenant on the father's death ; he is the rated occupier ; and the only other material fact is stated in these words :— "The widow *lives on these premises* since the death with appellant."

No other evidence was given. On that evidence alone the case was adjourned by the Revising Barrister for the attendance of the widow, "to prove that she had released or abandoned her claim on or interest in the farm" ; and because she did not attend, the Revising Barrister held that the claimant was not the sole occupier or entitled to a vote. But this is the Barrister's inference ; it adds nothing to the facts or to the evidence.

There being a contract of tenancy between the claimant and the landlord ; there being an occupation by the claimant under that contract, which made him liable as tenant, and which would charge him in use and occupation ; he being solely rated as the occupier, and presumably paying the rent and taxes, I think he has established, at the least, a *prima facie* right to the franchise, and no evidence was given to rebut that right.

The evidence as to his mother, at best, was evidence of a right of another character, derived from another source, and in no sense of a "joint occupation with her son," who alone was, in fact, in occupation "as tenant." There is no evidence of the assertion by the mother of any right of occupation, and any right which she may have had is, in my opinion, consistent with a sole occupation as tenant by her son, who alone was tenant in fact. It is also to be remembered that this is a rated occupier's case,

Appeal. 1893.

GORMLEY v. BUCHANAN.

Fitz Gibbon, L.J.

and for this franchise personal or residential occupation is not necessary.

The points of difference between me and the majority of the Court arise more sharply, and the grounds of my judgment, and the distinction between this and previous cases in which the claim to the franchise has been rejected, appear more clearly, in *Brown* v. *Buchanan* (1) than in this case, and I therefore do not now occupy time by detailing the reasons for my inability to concur.

BARRY, L.J. :—

I agree in the opinion expressed by the majority of the Court. We had this, amongst others of the registration cases standing for judgment, re-argued with the view, if possible, of laying down, as we were requested, some general principle which will enable the Revising Barristers to decide in each case as matter of fact whether the claimant of a vote is in sole occupation of the qualifying premises. I say "if possible," because what is demanded of us is a simple impossibility; it is legally and practically impossible. The demand so made upon us has originated in the idea that we are a Court of Appeal on questions of fact as well as on questions of law from the decisions of the Revising Barristers. It is impossible to conceive an idea more contrary to the statute under which this Court sits. To be satisfied of this it is only necessary to read the words of section 78 of 13 & 14 Vict. c. 69. "No appeal or notice of appeal under this Act shall be received or allowed against any decision of any Revising Barrister upon any question of fact only, or upon the admissibility or *effect of any evidence* or admission adduced or made in any case to establish any matter of fact only." I do not know that in any other Act of Parliament giving an appeal on a case stated, there is to be found language anything like as strong abridging and controlling the power of the appellate Court. Not only is there to be no appeal on a question of fact, there is even no appeal as to the effect of any evidence given. If it be possible to exclude this Court from drawing an inference of fact the language of that section has done it. And so it has been over and over declared in this Court. Here is

(1) [1894] 2 Ir. R. 318.

what I find said by Fitz Gibbon, L.J., in *Alexander* v. *Bourke* (*Mount Argus Case* (1) :—"I am of opinion that we have no jurisdiction to decide a question of fact, nor even as it seems to me to draw an inference of fact." Ever since I first had the honour of sitting in this Court, I have been protesting the same thing in these registration cases. But there is no doubt that both here and in England, where the legislation is similar, the Revising Barristers have adopted, not indeed universally and uniformly, but in a fitful and irregular manner, a practice of setting out in their cases the evidence only, and leaving the duty of drawing the inferences to this Court. Sometimes on a case so stated coming before the Court we have emphatically refused to draw any such inference, and the fact that we have done so has found its way into the reports. But turn over a few pages of the same volume of the reports and you will find the Court discussing the evidence in the minutest detail, with a view of showing that the finding of the facts by the Revising Barrister in any particular case was right or wrong, as the case may be, or drawing inferences which he has not drawn from facts which he has stated, the Court thus undertaking the performance of a duty which was his not ours to perform. There have been instances where we sent back the case to the Revising Barrister, directing him to find the facts himself from the evidence. It is said that this course commits the case again to the Revising Barrister in an objectionable manner. I do not share in this view. I see no reason why the Revising Barristers are not to be trusted to do their duty capably and uprightly. They are men of integrity and experience appointed by the head of the Judiciary in this country. Above all, it is by them that the Legislature has enacted that the facts must be found and the inferences of fact must be drawn. No doubt the practice of getting this Court to draw the inferences of fact is charming to the Revising Barristers, because it enables them to shift the *onus* and the responsibility from themselves to this Court, and perhaps not without attraction for the Judges of the Appellate Court, as enabling them to discuss the evidence in detail, and show that because in one case the voter had a

(1) 21 Ir. L. T. R. 68.

Appeal. 1893.

GORMLEY v. BUCHANAN.

Barry, L. J.

sister, while in another the voter had a mother, therefore the Revising Barrister was right in the one case and was wrong in the other. There is another reason, too, I am sure, why this Court has been so ready to draw inferences of fact, that is, the desire that justice should be done, and that when the evidence is stated the Court should see that the correct inferences are drawn. It may no doubt be a very desirable thing in the interests of justice, and even of uniformity, that this Court should have the power to draw, and should draw, inferences of fact, but the answer to it all is that it is not the law, and it is not only not the law, but by the law this Court is actually prohibited from drawing such inferences. But it is said, Suppose a Revising Barrister in Cavan, on a certain set of facts finds "black," and on precisely the same set of facts a Revising Barrister in Cork finds "white," are we not to make a choice between them? I think we can make no such choice, but if there is evidence to sustain the man in Cavan in finding "black" and evidence to sustain the man in Cork in finding "white," I think we must let "black" and "white" stand. It is not for us to correct the Legislature, and the Legislature says that in such a case the question of fact is for the Revising Barrister.

It must not be at all supposed that I should hold that a finding of fact obviously capricious and unreasonable should be let stand. In the case of such a finding I think we should apply the principle laid down in *The Metropolitan Railway Company* v. *Wright* (1). That case deals with the verdict of a jury, and says that the verdict must stand if a jury viewing the whole evidence reasonably might properly find a verdict to the same effect. I think we may apply the same rule to the findings of the Revising Barrister. If there is evidence to sustain his finding of fact to this extent that it is a finding at which a reasonable man viewing the whole evidence might properly arrive, I think we have no authority to discuss whether the finding is right or wrong. But if there is no evidence on which a reasonable man would be justified in finding as the Revising Barrister has found, then, I think we should reverse his finding, on the ground that there is no evidence to sustain it. It appears to me that the application of this rule

(1) 11 App. Cas. 152.

would get rid of all difficulty: it would avoid our having to affirm arbitrary or capricious findings on the one hand, and our transgressing the law on the other.

In the present case the Master of the Rolls has said that if he had to find the facts himself he would probably have come to the same conclusion, on the evidence, as the Revising Barrister did. It is not necessary to go so far; it is enough to say that there was evidence on which the Revising Barrister could reasonably arrive at his finding of fact, and, that being so, we have no power to reverse his decision.

Solicitors for the appellant: *Todd & O'Meara.*
Solicitor for the respondent: *Wilson.*

G. Y. D.

Appeal.
1893.

Nov. 13.
Dec. 1, 13.

M'KEEVER *v.* BUCHANAN (1).

Parliamentary franchise—Inhabitant householder—Occupation as tenant—Father of claimant dying intestate—Purchase of a farm by his widow out of his assets—Claimant accepted as tenant—Devastavit—*Joint or sole occupation—Consent of other next-of-kin.*

The tenant of a farm died intestate, leaving a widow, a son, and a daughter. The widow sold the farm and purchased another holding, on which she and her son and daughter continued to reside. The widow had some years ago returned her son's name as the tenant, and he was so accepted by the landlord, and had fixed a fair rent in his own name. The mother stated that she had no claim on the farm, but that she was to get her support there:—

Held, reversing the decision of the Revising Barrister, that the son was in occupation of the premises as tenant, and entitled to the franchise.

APPEAL by James M'Keever from the decision of Mr. Cuming, one of the Revising Barristers for the North Tyrone Division, striking the appellant's name off the list of voters for the said Division.

The facts appear from the case stated by the Revising Barrister, which was as follows:—

"At a Court held in the said Division of the said county by me, one of the Revising Barristers appointed to revise the list of voters of the said Division and County, the name of the appellant appeared on the Register of voters for Drumquin polling district of the said Division and County as an inhabitant occupier, and was duly objected to by the said respondent.

"Appellant produced and examined:—'My mother bought this farm with the money realized by sale of a farm my father had held, and that she sold seventeen years ago. My father was long dead then. I might be twenty-seven years old now. My mother was getting old, and returned my name some years ago. I have one sister, who lives there too.'

"Mother examined:—'I have no claim on the farm. I gave

(1) Before SIR PETER O'BRIEN, C.J., PORTER, M.R., PALLES, C.B., and FITZ GIBBON and BARRY, L.JJ.

my son full authority when he came of age. The originating agreement with the landlord dated 1891 is in my son's name. He is tenant. I am to get my support there of course.'

"There was no evidence that the father made any will.

"I held that the son, and mother, and daughter were all in occupation of the farm which was so bought with the proceeds of the father's estate who had died intestate; and that the son, therefore, was not sole inhabitant householder, and I struck out his name.

"If I am wrong, his name is to be reinstated in said list of voters."

The appeal which had been argued on November 13, 1893, was, by direction of the COURT, re-argued on December 1, 1893.

Healy and *M. J. Kenny*, for the appellant:—

The appellant is the tenant for the purposes of the Land Acts: he could purchase his holding under the Land Purchase Act; he could sell his holding; it is plain he is tenant for the purpose of the franchise, especially as questions of transmission of title will not be entertained in registration Courts, *per* Morris, C.J., in *Fowler* v. *Hanrahan* (1); *Leonard* v. *M'Cann* (2).

Ross, Q.C., for the respondent:—

The widow was to get her living off this farm, therefore the claimant was not in sole occupation: *Doonan's Case* (3). This farm was part of the assets of the father of the claimant: the same principle applies as if the father had died intestate in possession of the holding and his widow remained in possession with a son who was accepted as tenant by the landlord.

Cur. adv. vult.

Dec. 13.

SIR PETER O'BRIEN, C.J.:—

A man named M'Keever was tenant of premises and died intestate many years ago. His widow sold the farm which he had held, and bought with the proceeds of the sale the farm now held by the claimant. The widow was getting old, and returned the

(1) Lawson, Notes, 1888–89, p. 10. (2) *Ibid.* 11.
(3) Lawson, Notes, 1890–91, p. 14.

Appeal. 1893. M'KEEVER v. BUCHANAN. Sir P. O'Brien, C.J.

claimant's name to the landlord, and the landlord accepted the claimant as tenant. The widow stated that she had no claim on the farm, but she and a sister of the claimant were living there. The Revising Barrister disallowed the vote. I think he was wrong: his decision must be reversed, and the vote allowed. The mere presence of the mother and sister in the particular case affords no evidence of a joint occupation. The mother had clearly consented to the son being made sole tenant, and she said she had no claim on the farm; and whatever right the sister might have to trace the assets of her father and establish a claim in respect of them against the newly purchased holding by proceedings in a Court of Equity, she had no specific interest within the doctrine of *Cooper* v. *Cooper* (1) in the new holding that was purchased by the proceeds of the sale of the farm which had been held by the father. She had no interest in the new holding *in specie* The decision must be reversed, and the vote allowed.

PORTER, M. R.:—

I also am of opinion that the decision of the Revising Barrister was wrong, that is, that there was not evidence to justify his finding. This case differs from every other reargued before this Court during the present sittings, and also from every reported case. The farm out of which the vote is claimed here never had belonged to the father of the present occupier. The mother of the claimant purchased it herself, though, no doubt, out of her deceased husband's assets; and it never belonged to any one of the claimant's relatives except his mother. Having bought the farm in this way the mother was sole tenant of it, and paid the rent for some years herself; and then, probably feeling that she was getting aged, returned the name of her son, the claimant, to the landlord as the tenant. Since this time the claimant has been given the rent receipts in his own name, but his mother and sister have continued to reside on the farm along with him. The mother was produced, and said that she had no claim on the farm. To hold that she was in joint occupation of the farm as tenant would be contrary to the fact and to her own statement.

(1) L. R. 7 H. L. 53.

No doubt it would have been open to anyone claiming a share of the father's estate to have instituted a suit to follow the assets, and to have either taken the farm as a proper investment, or to have repudiated the purchase, and treated it as a *devastavit*. But the claimant's sister has done nothing of the kind.

The mother was the owner of the farm in question: it may have been through a previous breach of trust or *devastavit*. But the farm was hers, and she assented to the claimant being made the sole tenant. To hold that he is not the sole tenant with her consent would be contrary to the evidence in the case, and would lead to making the Registration Court a tribunal to try abstruse questions of equity, which it never was intended to be.

PALLES, C.B.:—

This is one of a vast number of cases stated for the present sittings, in each of which the Revising Barrister has set out upon the face of the case the evidence given before him and the inference of fact, which he has drawn from that evidence. In each case the question reserved for us is whether the Revising Barrister was *right* in drawing that inference of fact, and if we are of opinion that he was *wrong* the case states that the name of the claimant, is to be reinstated in, or struck out of, the list of voters as the case may be. I desire to say that this is an inaccurate form of reservation, and that much mischief results from its adoption. We have not jurisdiction to draw inferences of fact, and on such a reservation the only question we can determine is different from that in terms reserved, viz. the question of law, whether there was *evidence* to support the conclusion of fact at which the Revising Barrister has arrived. I mention this because this form of reservation which has been largely adopted during the present and former years has not unnaturally led to the questions argued before us being often questions of fact—not of law—and to minute matters of detail which affect the *weight* and not the *existence* of evidence being relied upon as distinguishing characteristics.

In the present case there was no evidence upon which the Revising Barrister could have arrived at the conclusion stated in the case. The widow has sworn in very words, "I have no claim

Appeal. 1893. M'KEEVER v. BUCHANAN. Palles, C.B.

upon the farm." Her subsequent words, "that she expected to be supported," mean as I read them that she expected that support from her son as a matter of moral duty not of right. She consented in the amplest manner that the new tenancy should be one in the son, and that she should not have any claim upon it, either by way of graft or otherwise.

Then with reference to the sister of the claimant—the holding is not part of the assets of the father. It might by agreement between the parties or by the decree of a Court of Equity be made part of those assets, but, up to the present, this has not been done. As matter of law the sister has at present no claim to an undivided share of the farm *in specie*—a circumstance which distinguishes the present case from those relied on by Mr. Ross. The decision should be reversed.

FITZ GIBBON, L.J.:—

The franchise claimed in this case is that of an inhabitant householder. The *nature* of an inhabitant householder's occupation differs from that of a rated occupier in being necessarily residential, and in a sense personal: he must "dwell," he must "inhabit," he must be a "householder," whereas a rated occupier may have the franchise, though lodgers or others inhabit the premises, or where the qualifying premises are incapable of personal occupation; for example, in the case of fisheries, gas-pipes, markets, waterworks, and the like. It seems to me, therefore, that the presence of other people upon the premises can more easily displace the occupation of an inhabitant householder than that of a rated occupier. But in both cases the *character* of the occupation must be "*as tenant or owner.*" The case here finds that the claimant's mother is to get her support upon the premises, and that his sister "lives there too." Therefore the qualifying premises are in fact inhabited by the claimant, his mother, and his sister, and it is plain that both mother and sister have equitable rights against the claimant, and can make the qualifying premises available to satisfy these rights. The Barrister categorically finds "that the son, and mother, and daughter, were all *in occupation* of the farm," and that the son "therefore was *not sole inhabitant householder.*" We reverse this finding, and we find that the claimant was the sole inhabitant

householder during the qualifying period. The only ground upon which I can understand this reversal of the Barrister's finding to rest is, that the claimant alone was tenant, that he alone occupied *as tenant*, and that where one person occupies or even inhabits the qualifying premises "as tenant," the fact that other persons who have equitable claims also inhabit them, and even have a beneficial occupation, will not deprive him of the Parliamentary Franchise. In this decision I entirely concur, but I confess my inability to distinguish either the facts of this case as found by the Revising Barrister, or the legal principles applicable to the case, from others, such as *Gormley's Case* (1) and *Brown's Case* (2), in which the majority of the Court, this year, has come to the opposite conclusion. I therefore regard this case of James M'Keever, rather as "a brand plucked from the burning" than as a light to guide Revising Barristers to steer a straight course through these occupation cases.

BARRY, L.J.:—

I concur in thinking that the decision of the Revising Barrister must be reversed. I base my opinion on the simple ground that I do not think there is evidence on which he could reasonably arrive at the finding. The farm here was originally the property of the claimant's mother. She made it over to the claimant, and renounced all her claims upon it before the commencement of the qualifying period. Her presence on the qualifying premises therefore does not disqualify the claimant. The claimant's sister is there too, no doubt. But she has no claim to the farm *in specie*. All she can do is follow her father's assets, and possibly establish a claim in a Court of Equity. But this farm is not assets of her father unless declared to be so by the circuitous process of Equity suit. Matters of this kind were never intended to be inquired into in a Revision Court.

Solicitors for the appellant: *Todd & O'Meara.*
Solicitor for the respondent: *Wilson.*

G. Y. D.

(1) *Ante*, p. 299. (2) *Infra*, p. 318.

Appeal.
1893.

BROWN *v.* BUCHANAN (1).

Nov. 15, 16.
Dec. 1, 13.

Parliamentary franchise—Rated occupier—Occupation as tenant—Father of voter dying intestate—Voter accepted as tenant—Consent of other next-of-kin—Joint or sole occupation—Onus *of proof.*

The father of the voter was the prior tenant of the qualifying premises. He died intestate in 1881, leaving his widow and the voter (his son) his only next-of-kin him surviving, and in occupation of the qualifying premises. In 1882 the voter fixed by agreement the fair rent of the holding under the Land Law (Ireland) Act, 1881, and was thenceforth treated as tenant by the landlord. The voter stated that he was accepted by the landlord as tenant, with his mother's consent. The mother all along lived on the farm, and was maintained by its produce. She was not examined to prove that she consented to the change in the tenancy, nor was any evidence given that she had surrendered her rights under her husband's intestacy, nor, on the other hand, was evidence produced by the objector to show that she made any claim upon the farm. The Revising Barrister held that the mother had not relinquished her claim on the qualifying premises, that there was in fact a joint beneficial occupation by the voter and his mother, and accordingly struck the voter's name off the register:—

Held (*diss.* Fitz Gibbon, L.J.), that there was evidence on which the Revising Barrister might so find, and that his decision should be affirmed.

Per Fitz Gibbon, L.J.: The tenant and rated occupier of qualifying premises does not lose the franchise upon proof of the simple fact that someone else lives on the premises, who appears *prima facie* to have an equitable claim upon the assets of a deceased tenant of the premises, when there is no evidence to show that that person has made any claim.

Appeal by John Brown from the decision of Mr. Kehoe, one of the Revising Barristers for the Division of North Fermanagh, striking the name of the appellant off the register of voters for the said Division.

The facts appear from the case stated, which was as follows:—"At a Court held at Enniskillen, on the 26th of September, 1893, for the Revision of the Lists of Parliamentary Voters for the

(1) Before Sir Peter O'Brien, C.J., Porter, M.R., Palles, C.B., and Fitz Gibbon and Barry, L.JJ.

polling district of Enniskillen, in the Division of North Fermanagh, the name of John Brown appeared at No. 126 on the Register of Voters as the rated occupier of a farm situate at Whitehill, in the said polling district, and he was objected to on the grounds that he did not occupy same as sole tenant or owner thereof.

"The following are the material facts which have been established by the evidence:—Robert Brown, the father of the voter, was the prior owner and tenant of the house and farm, which constitute the qualifying premises. Prior to his death, which occurred in December, 1881, he had served a notice upon his landlord to have a fair rent fixed. He died intestate, leaving his widow and the voter, his son, his only next-of-kin him surviving, and in occupation of the qualifying premises. On the 9th August, 1882, the voter, with, as he stated, the consent of his mother, settled the fair rent case with the landlord; and the voter and landlord thereupon entered into and signed an agreement under the Land Act, 1881, fixing the fair rent. In this agreement the voter was treated as the tenant of the farm, and he has since been tenant to the landlord, and has paid all rent and obtained receipts therefor in his own name, with, as the voter stated, the knowledge and consent of his mother. It was not proved that the voter's mother had gone to the landlord at the time of the voter's making the agreement with him, or of the putting his name in the rent receipts, or that her alleged consent to these transactions had been communicated to the landlord. The mother lives and has all along lived on the farm, helping to work it, and is maintained by the produce of the farm, and in no respect was there any change in her position in the household, or in her mode of support from the time when her husband was living. The voter's mother was not produced before me, nor any evidence given on behalf of the voter to show that the voter's mother had released or surrendered her rights under her husband's intestacy, while on the other hand no no evidence was produced on behalf of the objector to show that the voter's mother made any claim upon the farm beyond the evidence hereinbefore detailed, and the nature of it.

"Under the above circumstances, I came to the conclusion, in fact, that the voter's mother had never relinquished or released in any way her claim upon the qualifying premises, or consented that

Appeal. 1893. BROWN v. BUCHANAN.

the voter should hold the tenancy discharged from her claim, but that there was, in fact, throughout a joint beneficial occupation of the qualifying premises by the voter and his mother, and I therefore struck out the voter's name. If I was wrong in so doing his name should be reinstated on the register."

The appeal which had been argued on November 15 and 16, 1893, was, by direction of the COURT, re-argued upon December 1, 1893.

Ross, Q.C., for the appellant :—

The first question to consider is, What is the character of the occupation which must be possessed by the next-of-kin of the deceased tenant or other occupier, in order to deprive the occupation of the ostensible tenant of the character of sole occupation and convert it into joint occupation? It has always been held that the mere fact of other persons, who have certain equitable interests in the qualifying premises, being in occupation thereof along with the ostensible tenant is not sufficient to disqualify the ostensible tenant: *M'Loughlin's Case* (1); *M'Gee* v. *Colquhoun* (2); *Fowler* v. *Hanrahan* (3); *Leonard* v. *M'Cann* (4); *Kirkpatrick* v. *Murphy* (5); *Torish* v. *Sproule* (6); *Short* v. *M'Carney* (7); *Glendinning's Case* (8); *Bradley* v. *Chambers* (9). The mere possession by another person of a right to occupy portion of the premises does not disqualify the ostensible tenant, *e. g.* the fact that part of the premises are let to a lodger does not affect the right of the tenant of the premises to the franchise: *Phillip's Case* (10); *Duigenan's Case* (11); *Brewer* v. *M'Gowan* (12). Where there are several people belonging to one family in occupation "the head of the family" alone is to be considered the occupier; form 34, 1st Schedule to the Registration (Ireland) Act, 1885. Where the head of the family is the ostensible tenant and in occupation, the joint occupation that disqualifies him must be joint occupation *as tenant*: *Brewer* v. *M'Gowan* (12); *Smith* v. *Lancaster* (13). Where

(1) Alc. R. C. R. 249.
(2) Lawson, Notes, 1885, p. 12.
(3) Lawson, Notes, 1888-9, p. 10.
(4) *Ibid.* 11.
(5) Lawson, Notes, 1890-1, p. 13.
(6) Lawson, Notes, 1891-2, p. 12.
(7) *Ibid.* 11.
(8) Lawson, Notes, 1892-3, p. 43.
(9) *Ibid.* 47.
(10) Alc. R. C. R. 20.
(11) *Ibid.* 114.
(12) L. R. 5 C. P. 239.
(13) *Ibid.* 246.

there are several persons next-of-kin of a prior deceased tenant residing on the premises held by him, and the others have stood by while one of their number got himself recognised by the landlord as the tenant, and has paid the rent and been rated, and paid the rates, no hostile claim to the tenancy being put forward, the Revising Barrister is not at liberty to refuse the tenant a vote on the ground of joint occupation by the other next-of-kin: *Glendinning's Case* (1); and *Bradley* v. *Chambers* (2), where a decision refusing a vote on this ground was reversed. On the other hand, where there is a claim by the next-of-kin proved before the Revising Barrister he cannot admit the ostensible tenant to the franchise: *Doonan's Case* (3). The last two cases, and *Charlton* v. *Hanrahan* (4), show that this is not a matter of fact which the Revising Barrister may find without being liable to be reversed on appeal; and that this Court will, if necessary, look to the weight of evidence in such cases where the Revising Barrister has set out the facts from which his inference has been drawn.

The second question is, On whom lies the *onus* of proving that anyone residing on the holding has a claim to the tenancy? Plainly on the objector. The Legislature recognizes "the head of the family" as the occupier. The *onus* of proof lies on anyone who asserts a claim to share in or oust his occupation. Here there is no evidence that the widow made any such claim. All the evidence is the other way.

There was no appearance for the respondent.

Cur. adv. vult.

Dec. 13.

SIR PETER O'BRIEN, C.J.:—

The facts are succinctly stated in the case: they are as follows:—[His Lordship read the case.] I think the Revising Barrister's decision must be affirmed as there was evidence of a joint occupation. It is quite plain that the Barrister did not accept the statement that there was any change in the tenancy with the consent of the mother. As I said in *Simpson's Case* (5), it was quite open to him to disbelieve such a statement when made by a

(1) Lawson, Notes, 1892–3, p. 43.
(2) *Ibid.* 47.
(3) Lawson, Notes, 1890–1, p. 14.
(4) Lawson, Notes, 1892–3, p. 8.
(5) Lawson, Notes, 1892–3, pp. 10, 13.

Appeal. 1893. BROWN v. BUCHANAN. Sir P. O'Brien, C.J.

claimant. The case does not state categorically that any change was made with the consent of the mother. On the contrary, the expression is "as the voter stated," and the Revising Barrister is careful to tell us that it was not proved that the voter's mother had gone to the landlord at the time of the voter making the agreement with him, or of putting his name in the rent receipts, or that her *alleged* consent to these transactions had been communicated to the landlord, that the mother lived on the farm, and that there was no change in her position. In my opinion, this being the state of facts, and there being nothing to show that the widow abandoned or released her right, there was evidence to support the finding of the Revising Barrister. His decision must accordingly be affirmed. It is not necessary to refer again to the authorities I referred to in *Gormley's Case* (1).

PORTER, M.R.:—

Robert Brown died in possession of the farm and entitled to the tenancy. His death did not determine that tenancy and it has not been determined. It was impossible for the landlord to determine it by notice to quit. If he had brought ejectment for non-payment of rent, payment of the rent by anyone would have stopped that proceeding. This still existing tenancy, the property of the late Robert Brown, forms portion of his assets. This fact makes the generic distinction between this case and *M'Keever* v. *Buchanan* (2). The fair rent agreement does not weaken the effect of this. It was not in the power of either of the parties to that agreement to determine the tenancy of Robert Brown. The proceedings to fix the fair rent were commenced during the lifetime of Robert Brown, and were carried on and completed after his death by his son. The agreement, no doubt, affords the strongest evidence that the landlord accepted John Brown as his tenant; it made John Brown liable to the landlord for the rent: but as between John Brown and any other persons interested in the assets of Robert Brown, it did not affect their rights. In point of law it makes no difference whether the length of time since the new tenant was accepted by the landlord be, as in this case, ten

(1) *Ante*, 299. (2) *Ante*, 312.

years, or only three years or two, or one. The lapse of time is a circumstance to be taken into account by the Revising Barrister in finding the facts, but it is no more, it does not conclude the rights of the parties. On the facts, as found here, the voter's mother has lived on the farm, and has been maintained by its produce. The form and language of the case—the use of the words "as the voter stated"—indicate to me that the Revising Barrister viewed with some distrust the voter's evidence as to his mother's consent to his signing the agreement and getting the receipts in his own name. In any case, on the evidence, he came to the conclusion, in fact, that the voter's mother had never relinquished or released in any way her claim upon the qualifying premises or consented that the voter should hold the tenancy discharged from her claim, but that there was in fact throughout a joint beneficial occupation of the qualifying premises by the voter and his mother. We are asked by the appellant to say that the Revising Barrister is wrong in this finding; that there was no evidence on which he could arrive at this conclusion. I admit it is a more difficult case than some others that have come before us where a somewhat similar point has arisen. But it is a question of fact, and while the voter is, no doubt, the tenant and in occupation as tenant, I cannot hold the Revising Barrister wrong in deciding that he was not in sole occupation. His mother's position does not seem to have been affected by any act of his. She remains on "helping to work the farm" and "maintained by its produce." The fair rent proceedings made no new tenancy. After the agreement was signed it was the old tenancy still, though subject to a new rent, and with statutory incidents. In that old tenancy the mother had an undoubted interest. I find nothing to lead to the belief that she had changed her position in any way, and that she is not occupying the farm by virtue of her interest, just as much as her son is.

It seems to me that, without departing from what was previously decided by this Court in *Simpson* v. *Hanrahan* (1), and more emphatically in *Charlton* v. *Hanrahan* (2), we cannot decide that in point of law there was not evidence of joint occupation here. In *Charlton* v. *Hanrahan* (2), this Court went so far as to hold that

(1) Lawson, Notes, 1892–3, 10. (2) *Ibid.* 8.

Appeal. 1893.

BROWN v. BUCHANAN.

Porter, M.R.

the Revising Barrister was wrong in allowing the claimant a vote out of premises for which he had been accepted as tenant because his sister had during the qualifying period been in occupation of the farm until her marriage, though on her marriage all her claim to the assets of her father—whose the tenancy had been—was paid off and satisfied. I think that decision is an authority to show that the Revising Barrister, once he arrived at the conclusion that Brown's mother had not relinquished her claim and was still living on the farm, would have been wrong not to find that she was in joint occupation with the voter of the qualifying premises. It is not necessary to go so far as that, nor do I do so. But I am clear that there was evidence to support the finding of the Barrister.

PALLES, C.B.:—

The appellant claimed as the rated occupier of a farm. The Revising Barrister held as a fact that the claimant's mother had never relinquished or in any way released her claim upon the qualifying premises, or consented that the appellant should hold the tenancy discharged from her claim, and that there was in fact, throughout, a joint beneficial occupation of the qualifying premises by the appellant and his mother. The question for us is not whether, from the facts found by the Revising Barrister, he might have drawn the inference of fact that the occupation was that of the appellant solely, but whether that conclusion resulted as matter *of law*, from the facts found.

The appellant's father, the former tenant, died in 1881, leaving him surviving, and in occupation of the qualifying premises, his widow, and one son, the appellant. The widow, from her husband's death to the end of the qualifying period, continued to live on the farm, helping to work it, and was maintained by its produce. In no respect was there any change in her position in the household, or in her mode of support, from the time when her husband was living. Her husband, the former tenant, in his lifetime, served a notice upon his landlord to have a fair rent fixed. This application was undetermined at his death; and in August, 1882, his son, the appellant, settled the land case with the landlord, by entering into an agreement under the Land

Act of 1881, fixing the fair rent. In this agreement the appellant was treated as the sole tenant. Since that time he has paid the rent, and has obtained receipts in his own name. The appellant stated, when examined before the Revising Barrister, that he did all this with the consent of his mother; but as I read the case, the Revising Barrister did not believe that statement, and declined to act upon it. He certainly does not find any consent by the mother to the son being recognised as tenant. The statement in the case "that he has since been tenant to the landlord," in my opinion, means that the relation created by the agreement between him and the landlord continued during the qualifying period, but, be this as it may, the question for us is not whether he was tenant, but whether he was in *sole* occupation as tenant.

Under these circumstances, it is sufficient for me to say, and as my actual *ratio decidendi*, I confine myself to saying, that the absence of a finding that the new letting was with the consent of the mother makes the case identical with *Gormley* v. *Buchanan* (1), and that, for that reason, I am of opinion that the decision should be affirmed.

I understand, however, that one of my learned colleagues is of opinion that the case shows a consent by the mother to the recognition of her son. If so, a question arises as to the character of the consent necessary by those in occupation, to render the subsequent occupation that of him only who is recognised by the landlord as tenant. Respect for my learned brother prevents me from passing by this question unnoticed, although, as I have said, it does not, in my opinion, arise in the present case.

No doubt for many years a distinction has been drawn in this Court between two classes of cases. There were, on the one hand, cases in which one of several members of the family of a deceased tenant, to whom a personal representative has not been raised, had, with the assent of the other members of the family in occupation, been recognised by, or attempted to be constituted by, the landlord as sole tenant. The cases, on the other hand, were those in which such recognition or attempted constitution had not been with such assent. The decisions were that the recognised person was in the first class of cases, but not in the second,

(1) *Ante*, p. 299.

Appeal. 1893.

BROWN v. BUCHANAN.

Palles, C.B.

entitled to the franchise. I do not find any case in which the ground of this distinction is very clearly stated. It cannot have been that the recognition as tenant of the one member of the family constituted a new tenancy by estoppel. Section 20 of the Land Act of 1881 prevented any such result in an agricultural tenancy such as the present. In my opinion the *ratio decidendi* was something of this nature. Actual occupation as tenant is sufficient to confer the franchise, although the tenant has a bad title to the tenancy, and even although the title of his landlord to the reversion is also bad. It follows that if, after the death of a tenant from year to year, to whom a personal representative has not been raised, all those in actual occupation give up possession of the farm to the landlord, and if he puts back into possession one as tenant, the occupation of such person, if sole, entitles him to the franchise, although the personal representative of the deceased, when raised, could evict him. But further the right to the franchise of this person, so in sole occupation, would not be affected by his allowing the others, who previously had been in joint occupation with him, to go back into the premises as his licensees. And again, the same result would ensue if the other members in occupation did not physically quit the farm, if it were clearly proved that all of them agreed that their continuance upon the farm for the future should be as licensees of the person recognised by the landlord, and not under their claim of title under an alleged intestacy of the deceased tenant, as in that case their presence on the farm would by law be ascribed to the occupation of the recognised person. Were their presence referable to the claim of title it would amount to partial occupation by them, and therefore the sole occupation would not be in the recognised person. But in each and every of these cases the material question must have been, Was there that change in the actual occupation? Admittedly, before the recognition, the occupation was joint in all the persons who were living there. Such joint occupation could not be converted into the sole occupation of one without the consent of the others who formerly were in joint occupation. Now what is the consent necessary for this purpose?

In my opinion, consent that the selected person shall be

treated as sole tenant, without more, is not sufficient. Suppose, for instance, that in the present case the widow had consented that the son should be treated by the landlord as sole tenant, upon the terms that, notwithstanding the change in the nominal tenant, the widow should continue to remain as theretofore on the farm under the title she claimed as widow of her husband, whom she alleged to have died intestate: would it follow, as matter of law, from such an agreement, that her subsequent presence on the farm should, contrary to the express agreement, be deemed to be merely that of the licensee of her son? Could she be turned out at his pleasure? This is not a matter of mere form. It is one of great practical importance, and frequently arises before us on circuit, when under such circumstances the son marries, and there is a disagreement between the mother and the wife. I have no hesitation in answering these questions in the negative. The claim of a widow or of next-of-kin in occupation of a farm of one who is alleged to have died intestate are such that the occupation can be attributed to it: *Cooper* v. *Cooper* (1); and if there were an agreement, express or implied, that although a particular one of the next-of-kin should be treated as sole tenant by the landlord, yet the occupation should continue to be as theretofore in all the former occupiers, under their claims, as entitled in distribution to the estate of the alleged intestate, and that such occupation should be unaffected by the selection of the tenant, I should have no difficulty in holding that, for all purposes but one, the actual occupation ought to be treated as being the same as it was before the agreement. The exception to which I refer is that of any case between the landlord and the nominated tenant in which so treating the occupation would prejudice the landlord: as, for instance, in the case of an ejectment I should hold that service upon the nominated tenant to be sufficient. This, however, would arise from an estoppel *inter partes*, which, as we have frequently held, cannot affect the franchise.

It results from what I have said that if the Lord Justice be right in holding that, upon the construction of the case, we are to assume that the mother assented to the son being recognised as tenant, the other statements in the case show that assent to have

(1) L. R. 7 H. L. 53.

Appeal. 1893.

BROWN v. BUCHANAN.

Palles, C.B.

been of a character insufficient in law to render the subsequent occupation necessarily that of the son only

The decision should, in my opinion, be affirmed.

FITZ GIBBON, L. J. :—

As this is the case which most sharply raises the points of difference between myself and my colleagues, though I cannot suppose that my opinion is right, I am obliged to state my reasons for it, as the matter is of general importance. But having once done so, I shall thenceforth concur, upon the authority of this case, in the decisions which follow it, where it would be impossible to uphold a franchise to which it is decided that John Brown is not entitled.

We had the advantage of hearing these occupation cases argued on the first occasion on both sides by the same counsel; those who, in *Gormley* v. *Buchanan* (1) and in other cases, were heard against the franchise, in this case elaborately attempted to sustain it, and, *vice versa*, counsel for the objectors and for the claimants answered both their opponents and themselves. On the re-argument they took sides: in *Gormley's Case* (1) the appellant's counsel said the decision was "quite right"; the respondent's counsel said it was "utterly wrong"; and in this case Mr. Ross contended ably for the franchise, while in the next case Mr. Sullivan and Mr. Healy as ably answered him. It was at least some satisfaction to hear the question presented by counsel under circumstances which put even the unconscious influence of political interest upon their advocacy beyond the range of possibility.

In my opinion, John Brown, on the facts stated in the case, is entitled to the franchise as the rated occupier of the house and farm which constitute the qualifying premises. I must first put clearly the way in which I read the case stated: like all these cases, it first sets out a number of statements of fact; these correspond to the Judge's notes of the evidence at a trial, as distinguished from the findings of the jury: the following paragraph of the case, beginning with the words "under the above circumstances," corresponds with the verdict or findings of a jury, and

(1) *Ante*, p. 299.

the finding that there was in fact a joint beneficial occupation adds nothing to the evidence on which that finding rests. The conclusion cannot strengthen the premises. There is a suspicious identity of language between this and previous cases which suggests rather plagiarism, for the purpose of testing the limits of other decisions, than the statement of evidence actually given. It looks very much as if the Revising Barristers were setting "hard cases" for our exercitation. But, be that as it may, Mr. Kehoe has here stated his facts with great precision, and he has added negative statements for the purpose, as it seems to me, of bringing us definitely to decide whether the claims of the voter's mother, and the circumstances under which she lived in the house and on the farm, in this instance disqualify the rated occupier as a legal consequence, notwithstanding that he has been for eleven years the statutory tenant under a judicial agreement duly registered under the Land Act, 1881.

What are the facts? Robert Brown, the voter's father, was the tenant until his death, which occurred in December, 1881. He had served an originating notice upon the landlord, which was pending at his death. He died intestate, leaving his widow and the voter his only next-of-kin, and in occupation of the qualifying premises. Under the Land Act, 1881, the next-of-kin could have nominated one of themselves to succeed to the tenancy. Under the same Act, it was the duty of the Court to see that some person represented the deceased tenant in the proceedings which were pending at his death. Instead of taking any formal proceeding the case says that "the voter with, as he stated, the consent of his mother, settled the fair-rent case with landlord, and the voter and landlord thereupon entered into, and signed, an agreement under the Land Act, 1881, fixing the fair rent." The case then contains this express, and to my mind vital, statement:—"In this agreement the voter was treated as the tenant of the farm, and *he has since been tenant* to the landlord, and has paid all rent and obtained receipts therefor in his own name, with, as the voter stated, the knowledge and consent of his mother." It is argued that the Revising Barrister disbelieved this evidence; the case appears to me studiously to abstain from saying so, and the very last inference of fact which we could be justified in drawing would be, not only

Appeal. 1893. BROWN v. BUCHANAN. Fitz Gibbon, L. J.

that evidence stated on the special case was false, but that the very opposite was the fact, there being no affirmative evidence the other way. Mr. Kehoe expressly says, "no evidence was produced on behalf of the objector to show that the voter's mother made any claim upon the farm, beyond the evidence hereinbefore detailed, and the nature of it." The only other affirmative statement of evidence contained in the case, in addition to those which I have already quoted, is an express statement of what the widow's occupation was *in fact*, after her husband's death. It is in these words:—"The mother lives, and has all along lived, on the farm, helping to work it, and is maintained by the produce of the farm, and *in no respect was there any change in her position in the household, or in her mode of support, from the time when her husband was living.*" Repeating that every other statement in the case is merely and purely negative, am I not entitled to ask what was the wife's position "when her husband was living"? She was there as a member of his family; she had no occupation; he was, in the words of the Registration Acts, the "head of the family"; and, if it were a case of the household franchise, he must have been considered to be the sole occupier. There has since been "in no respect any change in her position in the household, or in her mode of support." Her husband was sole tenant while he lived. Since his death, for eleven years, her son has been sole judicial tenant, so declared by a Court of competent jurisdiction in a proceeding commenced in the father's lifetime, in which the widow had the same right to intervene as the son upon his death, and which ended, nine months after his death, in a judicial agreement tenancy between the landlord and the son, under the statute. If consent were material, can it be doubted that when for eleven years the widow paid no rent, never was rated, and continued to live on in the same position as when her husband was living, she knew and acquiesced in her son's tenancy? Under Deasy's Act the relation of landlord and tenant is founded on contract and not upon tenure. This case finds that the only tenancy legally existing is in the son. The case expressly finds not only that the voter "was treated as tenant," but that "*he has since been tenant*," and I am wholly unable to conceive any terms in which the case could have been more clearly stated for the purpose of raising the definite and

searching question—Does the tenant and rated occupier of qualifying premises lose the franchise upon proof of the bare fact that someone else lives on the premises who appears *prima facie* to have an equitable claim upon the assets of a deceased former tenant though there is no evidence to show that that person has made any claim? In my opinion such a position is untenable; I am further of opinion that it is contrary to the course of the decisions in this country, and it appears never to have been hinted at in England. First, as to English authority, in every edition of Rogers on Elections, down to and including the last, this passage appears:—"If a person occupy under a claim of title or right, it will be sufficient, for no investigation can be made into conflicting claims of title; the words "*as* owner," and "*as* tenant," show that it is the character in which the person has actually occupied which is to be ascertained, and not his right to occupy in that character. Any lawful occupation, therefore, seems to be sufficient." I do not cite this passage as an authority; four cases are referred to by the text-writer: *Burton* v. *Langhorn* (1), which has only a remote bearing upon the subject; *The New Sarum Case* (2), which does not seem to me to bear out the text, and, being only the decision of a Committee, would be of no weight if it did; and two Irish cases—*M'Loughlin's Case* (3) and *Corcoran* v. *Barnard* (4). The importance of the passage in Rogers is derived from its reference to these two cases as unquestioned authorities, and from the length of time during which it has remained as a statement of the law, in the book which is in constant use in England by those who administer it. In *M'Loughlin's Case* (3) the claimant had married the widow of a tenant; no administration was taken out; he had taken possession of the house, and had been in possession, not for eleven years, but for less than one year; he had paid all the rent and taxes, and he had maintained the children of the intestate. The Revising Barrister had held that he was not in possession of the said farm for his own sole use, his step-children being residents therein, and entitled to a share thereof, and that he did not, in fact, occupy the same. The Assistant Barrister rejected

(1) 5 C. B. 922.
(2) C. & R. 324.
(3) Alc. R. C. R. 249.
(4) 7 Ir. C. L. R. 374.

Appeal. 1893.

BROWN v. BUCHANAN.

Fitz Gibbon, L.J.

the vote. Eleven Judges met and considered the case. Johnson, J., gave his opinion against the vote; all the other Judges delivered their opinion in favour of it. Therefore, so far as the facts were concerned, the Court reversed the Barrister. It is said that *M'Loughlin's Case* (1) is "a blind case": if it be, it has been "leading the blind" for fifty-six years, and it is only now that both have reached the appointed end of that method of progression. *Corcoran* v. *Barnard* (2) does not seem to me to bear directly upon anything more than the character of the occupation which confers the franchise, but it is valuable on that point, and it is a considered decision of Baron Pennefather, in whose judgment I find this passage:—"The facts are not so precisely stated as we could desire, and we necessarily must draw some conclusions both of fact and law."

This brings me to remark upon the limits of our functions in cases such as this. The question of the existence of a separate dwelling in *Stribling* v. *Halse* (3) and in *Hasson's Case* (4), the question of the voter's residence in the militia cases and in the seamen's cases, and the question of the landlord's control in *Bradley* v. *Bayliss* (5) and in the Enniskillen cases—these were all questions of fact, no more and no less, than is the question of the next-of-kin's occupation in cases such as this. I mention these cases, because each of them is only one of a series of decisions in this country and in England. In each and everyone of them the Court of Appeal has been obliged to consider mixed questions of law and fact. In everyone of these cases, and in countless others, the evidence has been first set out in detail, and has been followed by the Barrister's finding or inference, which has been discussed and decided upon in the Appellate Court. They are all leading cases on the subjects to which they relate, intended to guide the Revising Barristers in similar cases. Sir George Jessel, in *Bradley* v. *Bayliss* (5), puts two extreme cases, and says that there will be an immense number of intermediate cases, which must be dealt with as they arise. But he states the inference which he thinks ought to be drawn from the facts stated, for the expressed purpose of aiding those who

(1) Alc. R. C. R. 249.
(2) 7 Ir. C. L. R. 374.
(3) 16 Q. B. Div. 246.
(4) 18 L. R. Ir. 68.
(5) 8 Q. B. Div. 195.

may have to consider them. Line-ball cases are inevitable; but if there is any line at all, or if it is straight, this case lies, in my opinion, far inside others which have been already ruled *in* by this Court, although the Revising Barrister had ruled them *out*. In the series of cases to which I refer, the decision of the Barrister has been as often reversed as upheld, and in no single English judgment is it suggested that the fact that the finding one way or the other is to determine the question, where the sufficiency of the evidence is discussed. It seems to me that if we were to shelter ourselves from deciding such cases upon the ground that the Barrister had decided them one way or the other, we should inevitably arrive at the conclusion that if two Revising Barristers found opposite ways, upon the same state of facts arising in two doubtful cases, we should be obliged to affirm both, although each contradicted the other.

There are innumerable cases, both in England and here, in which the only question discussed has been whether the facts were really distinguishable from those of previously decided cases, and, notwithstanding the words of the statute which limit our jurisdiction to questions of law, a great number of cases have been discussed and decided, both in England and here, upon the ground of the similarity of their facts to those in previously decided cases. While I by no means admit that any of the previous decisions are inconsistent with each other, there is not one in which the claimant has been disqualified, which appears to me to approach this case. I shall respect Lord Halsbury's advice by abstaining from comparing the facts of different cases, but I must mention *Carruthers' Case* (1), *Kirkpatrick* v. *Murphy* (2), *M'Gee's Case* (3), *Short* v. *M'Carney* (4), *Torish* v. *Sproule* (5), and, strongest of all, *Glendinning's Case* (6), and *Bradley* v. *Chambers* (7), in which the Revising Barrister's decision was reversed last year by three members of the present Court, and *M'Keever's Case* (8)—the last case decided in this Court itself—as being all cases in which the franchise was established upon principles and under circum-

(1) Lawson, Notes, 1888-9, p. 10.
(2) Lawson, Notes, 1890–1, p. 13.
(3) *Ibid.* p. 12.
(4) Lawson, Notes, 1891–2, p. 11.
(5) *Ibid.* p. 12.
(6) Lawson Notes, 1892–3, p. 43.
(7) *Ibid.* p. 47.
(8) *Ante*, p. 312.

Appeal. 1893. BROWN v. BUCHANAN. FitzGibbon, L.J.

stances which I cannot reconcile with a decision adverse to John Brown.

There is one other observation which I feel bound to make: it is as to the weight to be attached to decisions upon other cases, when cited before us in the exercise of our very peculiar jurisdiction over the Parliamentary franchise. In *Hadfield's Case* (1), Bovill, C.J., says:—"This Court has on numerous occasions departed from prior decisions." Brett, J., indicates his opinion that the decision of the Court is final and conclusive only in the case in which it is given, and the Chief Justice, in giving the judgment of the Court, says:—"I do not concede that we are absolutely bound to adhere to our decisions in the same manner as the House of Lords considers itself bound. There is no parallel between the two cases: the law seems to be clearly settled that decisions of the Lords are final and binding on the House itself in future cases. That principle, however, has never been applied to the Superior Courts of Westminster in cases where they have a peculiar jurisdiction: for instance, in the Queen's Bench on appeals from Quarter Sessions, in the Exchequer in matters of revenue, and in this Court in appeals under the Registration Acts, and in matters arising under the Railway and Canal Traffic Act. Great inconvenience and mischief would result in such cases where there is no appeal if the Court were absolutely bound by their decisions, though manifestly erroneous. I therefore hold that we are fully at liberty to reconsider any decision which may have been come to upon these Acts of Parliament." Brett, J., says:—"I think this Court is bound to administer the law as it exists at the time when the particular judgment is delivered." The judgment of my Brother Barry in *Hasson* v. *Chambers* (2) accepts this principle, and appears to me to go even further in its application. He says:—"As to this statute, our decisions are administrative as well as judicial. In deciding this case, as I do entirely upon the existence of the English decision, I wish to say that, either directly or indirectly, I pronounce no opinion upon the construction of the section in question, and reserve to myself the power to do so, irrespective of this case, upon any future question connected with

(1) L. R. 8 C. P. 306. (2) 18 L. R. Ir. 87.

it that may come before us." I repeat my opinion that it is not necessary in the present case to disregard or to contradict any of our previous decisions; for in each and every one of those in which we decided against the franchise, until *Gormley's Case* (1) and this case, I think the facts were substantially different. But I do say that, if it were necessary, we should be bound, and, are at liberty, to depart from the previous decisions, if we were of opinion that John Brown was entitled to the franchise of a rated occupier.

The principle which this case appears to me to lay down, and from which I respectfully dissent, is that where there is an occupation *as tenant* of qualifying premises by one person otherwise qualified, the occupation of that person is rendered insufficient to confer the franchise, or is deprived of the character of sole occupation as tenant, by the fact that another person, who is not tenant, and who does not occupy as tenant, and who is in no legal sense a *joint* occupier, has beneficially occupied the same premises, simultaneously with the claimant, but in another and a different right and character. The present case goes even further: it ousts the tenant's occupation though no evidence was given of any claim by his mother to occupy at all, and though the evidence given as to her proved nothing more than the mere fact that she was there and had rights which might possibly be asserted in a Court of Equity, or upon taking out administration to her deceased husband, the former tenant. It goes even further still, because the only affirmative statements in the case are in themselves evidence of a consent to a surrender of the old tenancy, and to the substitution of a new one; they are, at the very least, evidence of consent to an exclusive occupation as tenant by the claimant, upon the terms of his paying the rent and fulfilling all the obligations of a sole tenant and sole rated occupier, and the case expressly states that no evidence was given the other way. I should even have been prepared to hold that the finding of a "joint beneficial occupation" was so much against the weight of evidence as to be unsustainable: the word "joint," as applied to the facts stated, is used in no technical or legal sense. But upon my construction of Mr. Kehoe's carefully stated case, I

(1) *Ante*, p. 299.

Appeal. 1893.

BROWN v. BUCHANAN.

Fitz Gibbon, L. J.

think he has put it beyond doubt that he meant to find, for the purpose of taking our decision upon it, that the mere beneficial enjoyment of her residence upon the premises by the widow was, as matter of law, inconsistent with the existence of the right to the franchise in her son.

It is needless for me to add that no decision, based upon the reasons which have commended themselves to me in these Registration cases, could by any possibility affect or bear upon any question arising under the Statutes of Limitation, as to the possession or ownership of the qualifying property.

BARRY, L. J.:—

A good deal of what has been said by Lord Justice Fitz Gibbon in the latter part of his judgment relieves me of one difficulty—a difficulty by which I was not very much overwhelmed, but still at the same time sufficient to create a doubt in my mind. He has read high authority for the proposition that in a case arising on the Registration Acts we are not bound by a previous decision of this Court. Great stress was laid during the argument and also in his judgment upon the case known as *M'Loughlin's Case* (1). That is apparently an authority of a high character, indeed, very potential in its weight and significance; but notwithstanding the stress that has been laid on that case in the argument and in the judgment of the Lord Justice, it appears now that we are not bound by it at all, and so I am relieved from the necessity of saying anything more about it. In *Simpson* v. *Hanrahan* (2)—another of the numerous cases about the next-of-kin remaining in possession—the Revising Barrister held:—"I came to the conclusion that there was in fact a joint beneficial occupation of the qualifying premises by the claimant and his mother and sister, and I disallowed the claim"; and this Court affirmed his decision. It appears to me that that case governs the question before us. But I do not refer to it so much even for that as for the sake of calling attention to the following passage, which

(1) Alc. R. C. R. 249. (2) Lawson, Notes, 1892–3, p. 10.

I cite from the judgment of Lord Justice Fitz Gibbon. He says (at p. 13) :—" We have no business whatever to find facts; I am sorry that the habit has sprung up in England and here of leaving it to the Court, and the Court has drawn inferences of fact. In the present case, not only is there ample evidence to sustain the finding of the Revising Barrister, but it is hard to see how he could have come to a different conclusion on the evidence." That is exactly the view taken by the Lord Chief Justice, the Master of the Rolls, the Lord Chief Baron, and myself in the present case, and by all the Judges of this Court in the long catalogue of cases so ably brought under our notice by Mr. Sullivan in *Arbuckle* v. *Buchanan* (1). If the proposition is right that where the widow of a deceased tenant remains on in occupation, claiming a right so to do, the landlord can select her son as the tenant, and in that way make her no longer an occupier of the farm; then the law, no doubt, is simplified, but it is simplified in a way that makes all the previous decisions vanish.

I certainly would not like to be the person to go down and tell the widow Brown that, inasmuch as the landlord had accepted her son as tenant, she must depart. I think she would give anyone bringing her such news a piece of her mind in very strong language. It is plain to me that there was between themselves no change in the position or rights of the parties. The widow continued to occupy as she had occupied before; and she could have claimed that occupation as of right. The change in the landlord's books made a change, no doubt, but only as between her son and the landlord. It was a mere matter of the landlord's convenience. Therefore, I see nothing in the evidence to show that the character of the occupation of the widow was changed. The character of her occupation was for the Revising Barrister to determine on the evidence before him. He has determined it as a matter of fact, as he states twice in the case.

I think we should adopt what was said by the Lord Chief Baron in stating what was decided in *M'Keever's Case* (2), and what he means to decide in this case. The proposition which he has laid down I understand amounts to this :—A tenant from year to

(1) *Infra*, p. 339. (2) *Ante*, p. 312.

Appeal. 1893. BROWN v. BUCHANAN. Barry, L.J.

year dies intestate; he leaves in occupation a widow, two sons, and two daughters, the number is immaterial; no administration is taken out; the family remain in occupation without making any change in the mode of dealing with the land: they are supported out of the produce of the land; the rent is paid out of the profits; they all exercise the same rights as before, and do nothing to induce the belief that the man that happens to be selected by the landlord as tenant is to be regarded as being in sole occupation, and that they should be regarded as mere licensees. In that state of things, there being no evidence of their relinquishment of their position as next-of-kin, I am of opinion that the barrister is justified, nay more, he is called upon to hold that there is joint occupation. In other words, I am of opinion that the mere selection of one of the next-of-kin as tenant by the landlord does not *per se* change the character of the occupation. The *onus* lies on the person so selected, if he claims the franchise, to prove a change in the character of the occupation, and if he gives no evidence to prove relinquishment of their claims by the others he fails to satisfy that *onus,* and he must be held by the Barrister to be in joint occupation with the others.

Solicitor for the appellant: *C. F. Falls.*

G. Y. D.

ARBUCKLE *v.* BUCHANAN (1).

Appeal.
1893.
Nov. 16.
Dec. 6, 13.

Parliamentary franchise—Rated occupier—Occupation as tenant—Grandfather of claimant dying intestate—Consent of other next-of-kin—Claimant accepted as tenant.

The claimant's grandfather was tenant of the qualifying premises. He died many years ago. No personal representation to him was taken out, but his two sons (claimant's father and uncle) remained in occupation of the premises, the claimant's father being treated as the tenant by the landlord. On his father's death the claimant was accepted as tenant by the landlord. During the qualifying period the claimant's uncle and the next-of-kin of the claimant's father all resided together on the premises. It was alleged that the claimant's father made a will, but no probate of same was obtained, nor were letters of administration to his estate taken out. The Revising Barrister, on these facts being proved, allowed the case to stand for the attendance of the claimant's uncle and his father's other next-of-kin, to prove that they had released their claims or had assented to any change of tenancy. None of them attended, and no further evidence was given. The Revising Barrister held that the grandfather died intestate, that the uncle still continued to occupy the premises as one of his next-of-kin, without having released his claim on the farm. He also held that he had not sufficient legal evidence to enable him to hold that the next-of-kin of the claimant's father (other than the claimant himself) had released their interest or ceased to occupy the farm as such next-of-kin jointly with the claimant as joint occupiers :—

Held, that the decision of the Revising Barrister should be affirmed.

APPEAL by John James Arbuckle against the decision of Mr. Cuming, one of the Revising Barristers for the North Tyrone Division, refusing to admit the appellant to the franchise.

The facts appear from the case stated, which was as follows :—

"At a Court held in said division by me, one of the Assistant

(1) Before SIR PETER O'BRIEN, C.J., PORTER, M.R., PALLES, C.B., and FITZ GIBBON and BARRY, L.JJ.

Appeal. 1893. ARBUCKLE v. BUCHANAN.

Revising Barristers appointed to revise the lists of voters for said division and county, the appellant's name appeared on the supplemental list of rated occupiers for the Dunnamanagh polling district of said division of said county, and was duly objected to by said second respondent. Poor-law valuation is £10 of the farm he claims out of.

Appellant deposed that his father died four years ago, tenant from year-to-year of the farm, and that his name was entered in the rent-books as tenant of this farm then (receipt) produced, dated [blank], 1893, for rent of 1892, in name of appellant. My father made a will. A document purporting to be this will was produced on behalf of appellant, but was objected to on behalf of objector as being unproved, and was rejected by me. The appellant swore that the will left the farm to him, but I rejected this evidence as illegal. He further deposed that the farm was held by his (appellant's) grandfather as tenant from year to year up to his death many years ago, and that he left as his next-of-kin residing on the farm two sons, appellant's father and an uncle, who is still residing thereon. Appellant's father and grandfather were both called John. No evidence was given or offered that the grandfather had made a will. Appellant's father left as his next-of-kin residing on said farm two sons and a daughter, who still reside there. No evidence was given or offered that any administration had been taken out to appellant's grandfather, or that the uncle had assented to any change of tenancy or ownership in the farm.

The case stood adjourned by me to allow of the attendance of the uncle and the brother and sister to prove that they or any of them had abandoned or released their claims, or interest in said estates or farm, or had assented to any change of tenancy and ownership or further evidence for voter.

None of them attended, and no further evidence was given.

It was contended on behalf of the objector that appellant and his father was each, while his name appeared as tenant, a trustee for the beneficiaries who jointly occupied with him.

I held that the grandfather died intestate; that the uncle continued to occupy the premises as one of his next-of-kin, and had

not released or abandoned his claims on or interest in said farm, and was still occupying same as one of the next-of-kin of the original intestate.

I also held that I had not sufficient legal evidence to enable me to hold that the sister and brother of appellants, or either of them, had released or abandoned their interest in the farm as next-of-kin of appellant's father, or ceased to occupy same as such next-of-kin jointly with appellant as joint occupiers.

If I am wrong in these findings the name of said appellant is to be reinstated on said list as a voter, otherwise same is to remain struck off."

The appeal which had been argued on November 16, 1893, was, by direction of the COURT, re-argued on December 6, 1893.

Ross, Q.C., for the appellant:—

This is the same as *Brown* v. *Buchanan* (1). The argument of the appellant in that case will be in the recollection of the Court.

THE COURT intimated that they did not require to hear the argument repeated.

Sullivan, Q.C., and *Healy*, for the respondent:—

Where a tenant of a farm or house dies before the commencement of the qualifying period, leaving two or more next-of-kin in possession after him, whether any one of them *can* be held to be in sole occupation as tenant during the qualifying year depends upon circumstances which may be classified as follows:—

I. Where the tenant has devised the place to a particular person who with the assent of the executor has gone into possession, the devisee alone occupies as tenant, and the Revising Barrister *cannot* hold that the presence of the other members of the family is of such a character as to prevent the devisee from occupying as sole tenant.

(1) [1894] 2 Ir. R. 318.

Appeal. 1893. ARBUCKLE v. BUCHANAN.

II. Where there has been a valid surrender of the old tenancy (*e.g.* by the executor or administrator, or all the next-of-kin), and the creation of a new legal tenancy—not by estoppel—with the claimant, the same result follows, and the Revising Barrister *cannot* hold that the presence of the other next-of-kin is of such a character as to prevent the devisee from being in occupation as sole tenant: *Glendinning's Case* (1).

III. Where one of the next-of-kin takes out administration to the deceased tenant, occupies the premises, pays the rent, even though the receipt is given in the name of the representative of the deceased tenant, still, at least, if it is done with the consent of all concerned, the Revising Barrister *cannot* hold that the presence of the other next-of-kin is of such a character as to prevent the administrator from being in occupation as sole tenant: *Bradley* v. *Chambers* (2).

IV. Where on the death of the tenant nothing more happens than that the next-of-kin go on living in the place as before, though one of them may have paid the rent and got the receipts in the name of the representative of the deceased tenant, the Revising Barrister *cannot* hold that this one or any of the next-of-kin has occupied solely as tenant, and if he so finds he will be reversed by this Court: *Simpson* v. *Hanrahan* (3); *Doonan's Case* (4). The refusal of the landlord to accept the claimant as tenant, as in *M'Gee's Case* (5), carries the case no further, but produces the same result. The old tenancy continues: *Mulcaire* v. *Joynt* (6), and no one is in sole occupation under it.

V. Now comes the intermediate case—where the landlord accepts one member of the family as tenant, gives him receipts in his own name, and enters his name in the rent-book: (*a*) Where evidence is given of the consent of the other next-of-kin to the surrender of the old tenancy and the creation of a new one, if the Revising Barrister believes the evidence, he ought to hold that, there being a new legal tenancy vested in the claimant, he alone has occupied as tenant, the occupation of the others being no

(1) Lawson, Notes, 1892–93, p. 43.
(2) *Ibid.* p. 47.
(3) *Ibid. per* Palles, C.B., at p. 13.
(4) Lawson, Notes, 1890–91, p. 14.
(5) *Ibid.* p. 12. [L.J.
(6) 32 L. R. Ir. 683, *per* FitzGibbon,

longer referable to any estate in the lands or claim upon them as assets: *Carruther's Case* (1). In that case, according to the evidence given, all the family consented to the change. The Revising Barrister, believing this evidence, held the claimant to be in sole occupation, and his decision, being a decision of fact, was affirmed as there was evidence to sustain it. So, too, in *Short* v. *M'Carney* (2), where all the family consented to the change of tenancy, believing that they ought so to do in compliance with the deceased tenant's unproved will, the Revising Barrister held the claimant sole occupier, and his decision was upheld. But (*b*) the Revising Barrister may disbelieve the evidence of consent, and disbelieving it hold the occupation joint: *Simpson* v. *Hanrahan* (3). There the claimant had been accepted as tenant, had got receipts in his own name, and swore that this was done with the consent of the other next-of-kin. The Revising Barrister disbelieved him, and held the occupation joint, and his decision was upheld. Still more (*c*), even when the Revising Barrister thought the evidence of consent sufficient—so necessary is it that clear evidence of surrender of interest should cover the entire qualifying period—he was reversed where the payment of the distributive share to one of the occupying next-of-kin was not made till after the commencement of the qualifying period: *Charlton* v. *Hanrahan* (4). But (*d*) where, as in the present case, there is no evidence given of consent by the next-of-kin to the surrender of the old tenancy, the finding of joint occupation must surely be upheld: *Smyth* v. *Chambers* (5). Under such circumstances this finding has never been reversed.

Two cases appear at first sight to be against the view we contend for:—In *Kirkpatrick* v. *Murphy* (6) an imbecile sister was in occupation; in *Torish* v. *Sproule* (7) minor children were resident on the premises; yet the vote was allowed in each case. The facts in both cases and the grounds of the decisions are very special. In both cases the Revising Barrister *found as a fact* that the occupation was sole; and the Court of Appeal, in affirming

(1) Lawson, Notes, 1888-9, p. 10.
(2) Lawson, Notes, 1891-2, p. 11.
(3) Lawson, Notes, 1892-3, p. 10.
(4) *Ibid.* p. 8.
(5) Lawson, Notes, 1886-7, p. 85.
(6) Lawson, Notes, 1890-1, p. 13.
(7) Lawson, Notes, 1891-2, p. 12.

Appeal. 1893. ARBUCKLE v. BUCHANAN.

him, merely held that there was some evidence in the cases as stated from which that inference *could* be drawn. If the Revising Barrister had held the occupation joint (as it really was), could the Court, on the evidence, have reversed that finding of fact? If not, neither of those cases is an authority against our contention, for we have that finding here. *M'Loughlin's Case* (1) is scarcely an authority as no reasons are given for the decision.

Cur. adv. vult.

Dec. 13.

SIR PETER O'BRIEN, C.J.:—

The material facts of this case appear to be as follows. A man named Arbuckle, grandfather of the claimant, had a farm. He died many years ago. His son (claimant's father) was treated as tenant by the landlord, but another son (claimant's uncle) remained on in occupation of the farm; claimant's father and uncle continued to reside on the farm. Claimant's father died, leaving claimant and other next-of-kin. Though it was alleged the grandfather made a will, there was no evidence of it, and the case was argued on the basis that both the grandfather and father of the claimant died intestate. The Revising Barrister held that the uncle continued to occupy the premises as one of the next-of-kin of the claimant's grandfather, and that there was not sufficient evidence to hold that the brother and sister of the claimant had released or extinguished their claims. The case was allowed to stand for the production of the uncle and brother and sister to prove that they had abandoned their claims or interest in the farm. They did not come forward, and the Revising Barrister disallowed the vote on the ground that the claimant was not the sole occupier. I think there was evidence to sustain his finding, and that the decision must be affirmed. I need not refer to the opinions of Lord Cairns and Lord Hatherley in *Cooper* v. *Cooper* (2), the consequences of which we have already dealt with in several cases at this sittings.

PORTER, M.R.:—

I agree. I think this is a plain case. It is determined by the finding of facts by the Revising Barrister. No evidence was

(1) Alc. R. C. R. 249. (2) L. R. 7 H. L. 53.

given or offered that the claimant's uncle, who was still in occupation, had assented to any change in the tenancy on the grandfather's death; and the Revising Barrister finds "that the grandfather died intestate, that the uncle continued to occupy the premises as one of his next-of-kin, and had not released or abandoned his claim on or interest in the said farm, and was still occupying the same as one of the next-of-kin of the original intestate." If this be so, the claimant was not sole occupant.

PALLES, C.B. :—

I concur.

FITZ GIBBON, L.J. :—

The finding of fact which the Master of the Rolls has read entirely distinguishes this case from the others, in which there has been a difference of opinion.

BARRY, L.J. :—

I concur.

Solicitor for the appellant: *Wilson.*
Solicitors for the respondent: *Todd & O'Meara.*

G. Y. D

Q. B. Div. 1893. Nov. 23.

LOVELL *v.* CALLAGHAN AND OTHERS (1). (RE CORK BURGESS ROLL.)

Municipal franchise—Burgess roll—"House" or "shop"—Stall in market—Occupation—Municipal Corporations (Ireland) Act, 1840 (3 & 4 *Vict. c.* 108), *sect.* 30.

C. and others held, as weekly tenants, from the Corporation of the city of Cork, and subject to the regulations of the Corporation, stalls in the public market. The market building was closed and locked from 10 p.m. to 9 a.m., the keys of the building being kept by, and a night-watchman employed and paid by, the Corporation. These stalls were open in front, and were fitted with moveable benches:—

Held, that such stall-holders were not occupiers within the meaning of 3 & 4 Vict. c. 108, s. 30; and that such stalls were not shops within the same section.

Re Falls (3 Cr. & D. 267) questioned.

APPEAL, by way of motion to make absolute, notwithstanding cause shown, a rule, dated the 17th November, 1893, directing that the names of John Callaghan and others, respondents (twenty-two in number), should be erased from the burgess-roll of the borough of Cork. The names of the several respondents appeared on the Town Clerk's list of persons entitled to be enrolled as burgesses, pursuant to 3 & 4 Vict. cap. 108, for the centre ward of the borough, for the year 1893, and on the existing burgess-roll for the year 1893–4, in respect of premises described as No. — , Grand Parade Market (the numbers being in each case given). The names of the respondents were duly objected to at the Revision Court held on the 31st October, 1893, on the grounds—1, that none of these stalls in the Grand Parade Market were a "house, counting-house, warehouse, or shop," within 3 & 4 Vict. cap. 108, section 30; 2, that the respondents were not occupiers within the meaning of that section, and had no sufficient control over the

(1) Before SIR P. O'BRIEN, C.J., and O'BRIEN, HOLMES, and MADDEN, JJ.

premises, and had not occupied same during the whole of the qualifying period; 3, that the rating was insufficient; 4, that no municipal rates were assessed or paid thereon.

The respondents were stall-holders, holding the premises above-mentioned (which were, in each case, stalls in the market building) as weekly tenants of the Corporation, under written agreements, the tenant being bound to comply with and observe the conditions of occupation and regulations of the Corporation. These stalls were fitted with moveable benches or tables, and were open at all times in front. The Corporation employed and paid a watchman, who remained in charge during the night, opening and closing the market building night and morning. This watchman was employed by, and could only be dismissed by, the Corporation. The Corporation officials alone had keys of the gates of the main building. The respondents used to leave meat exposed in their stalls during the night, and used to give money to the watchman for looking after it. The respondents alleged that they had a right to enter the stalls at night. Each stall was rated for the relief of the poor at £9, a further £1 being inserted in the rate-book for landlord's repairs and insurance; but rates were only paid on the £9. The Corporation paid all rates and taxes; no municipal taxes were assessed or paid on any of these stalls.

One of the respondents described the stalls as solidly and substantially divided from each other, and from the public passages, the front portion of each being a heavy counter, with a heavy framework superstructure for hanging meat, many of the stalls being furnished with doors at the entrance from the public passages, all being furnished with desks and lockers, and many being furnished with partitioned offices and apartments; the stall-holders remaining after closing hours till their premises were suitably set to rights, and getting admission when the market was closed, at any reasonable time, on application to the watchman.

Some of the respondents had held under these weekly tenancies for over thirty years. The respondents alleged that the watchman was the joint servant of the Corporation and stall-holders, that he was always selected by the stall-holders, his appointment being confirmed by the Corporation, and that the present watchman was

Q. B. Div. 1893.

LOVELL v. CALLAGHAN.

paid a small sum weekly by each stall-holder, and was caretaker of each stall for the holder as well as of the market in general for the Corporation.

Matthew J. Bourke, Q.C., and *Brereton Barry*, for the appellant (Lovell):—

These stall-holders are not entitled to the franchise. These stalls are not "shops" within section 30 of the Municipal Corporations Act, 1840: see *Hooper* v. *Kenshole* (1); *Pope* v. *Whalley* (2). The market building is under the control and dominion of the Corporation, and the user of the market is not an "occupation" that satisfies the requirements of the section; the respondents are mere licensees, and they are not rated. As to occupation, see *R.* v. *St. Giles in the Fields* (3), and as to the payment of the rates, *Reg.* v. *Mayor of Bridgnorth* (4).

T. M. Healy, for the respondents:—

These stalls should be held to be shops within the section: see *R.* v. *Bailey* (5), and *In re Falls* (6), where Mr. Napier (then assessor, afterwards Lord Chancellor) held that an attorney's office was a "counting-house," and was prepared to hold that "a stall or shed for the exposure of goods for sale" was a shop, within section 30. See also *Re Campbell* (7), and *R.* v. *Poynder* (8). The rates are indirectly paid by the stall-holders, and the occupation is sufficient: *R.* v. *Trapshaw* (9); *Reg.* v. *St. Mary Kalendar* (10); *Kiernan's Case* (11).

Brereton Barry, in reply (12).

(1) 46 L. J., M. C. 160; 2 Q. B. Div. 127. [76.
(2) 6 B. & S. 303; 34 L. J., M. C.
(3) 4 A. & E. 495.
(4) 10 A. & E. 66.
(5) 1 Moo. C. C. 23.
(6) 3 Cr. & D. 267, 269.
(7) *Ibid.* p. 277.
(8) 1 B. & C. 178.
(9) 1 Leach, 427.
(10) 9 A. & E. 626.
(11) 5 L. Rec. N. S. 73.
(12) *Hall* v. *Metcalfe*, Fox's Registration Cases (1891), p. 227, was not cited during the arguments.—[REP.]

SIR PETER O'BRIEN, C.J. :—

We are all of opinion that the names of the persons to whom objection has been made must be struck out. For my own part, I do not think that "stalls" such as those described in the affidavits in this case are within the Act of Parliament. That the word *stall* was well known to the Legislature is clear from other statutes; it does not, however, occur in the section of the Act under consideration; the word "shop" does occur; but that, in my opinion, denotes something different from a "stall." A stall means a place to stand in; and, in my view, the letting of one of these stalls was a grant of a mere licence to use a bench in the market.

In the first place, I am of opinion that these stalls are not shops within the Act of Parliament; and, secondly, there is, in my opinion, no occupation at all by these persons within the meaning of the Act. What was given was a mere licence. The market was closed every night, and could be closed by the Corporation on days they wished to name. If these men who claim the franchise insisted on remaining in the market after nightfall, I think they would be trespassers. The watchman who remained there in charge on duty during the night, though said to be paid by both parties, was in my opinion the servant of the Corporation. In my opinion there was but a mere licence to use the market, and the real occupiers were the Corporation.

Upon these short grounds—first, that these stalls were not shops, and, secondly, upon the question of occupation—I am clearly of opinion that these persons have not the necessary qualification, and that their names must be struck off the list.

O'BRIEN, J. :—

I concur, but must take leave to express my entire dissent from the opinion attributed to Mr. Napier in the report to which Mr. Healy has referred (1) if, indeed, the expression used, that a stall was not strictly a shop, necessarily amounted to a statement that, for the purpose of the franchise, they were the same thing, which was not the matter at all for decision. It must be remem-

(1) *In re* Falls, 3 Cr. & D. 267.

Q. B. Div. 1893.

LOVELL v. CALLAGHAN.

O'Brien, J.

bered that Mr. Napier did not then hold the high position to which he afterwards attained. It is impossible to construe an Act of Parliament otherwise than in accordance with the common use of language; and no person, having regard to the ordinary usage of language, could take the words *shop* and *stall* as meaning the same thing. The persons who are here asserting their claim to the franchise describe themselves as stall-holders not as shop-keepers, thus themselves preserving the distinction.

Upon the other question, the view thrown out by the Court during the argument is, I think, the right one, namely, that founded on exclusive occupation so-called—the position of these persons being, not that of occupiers at all in the ordinary sense, but that of licensees. The rights and the position of the Corporation must also be considered. There is not one of their regulations which does not treat these persons as licensees. It is not merely that a stall is not a shop; these stalls are places occupied within the limits of property used for public purposes which the Corporation of Cork would have no right to alienate.

HOLMES, J.:—

I have not the least doubt that there was no occupation which would bring these persons within section 30. I am also of opinion, so far as I can judge from the evidence before me, that these stalls were not shops within that section. Any little doubt which I have upon this point would probably be relieved if the matter was further investigated.

I have no doubt, however, upon the other question, that the persons in occupation at all hours of the day and night are the Corporation. That is shown by the fact that the Corporation have always paid the rates. It is not suggested that this was done pursuant to a contract. The stall-keepers were assessed; and they no doubt would have paid the rates, were it not that it was well understood that it was the Corporation who were in possession.

The position was that the Corporation, being in possession all the time, permitted these persons to be there as licensees, and to use the market during the day, and to leave their goods there at night.

MADDEN, J. :—

I am clearly of opinion that these persons have not an occupation of the character contemplated by section 30, that is, a continuous and exclusive occupation. They hold under a licence which entitles them to occupy, but only under stringent conditions. This being my opinion, it is unnecessary to consider the question whether these physical structures are stalls or shops within the meaning of the section.

Solicitor for the appellant: *H. A. Wynne.*
Solicitor for the respondents: *M. Murphy.*

A. E. R. J.

MITCHELL *v.* SMYTH (1).

(1893. No. 930.)

Summary jurisdiction—Justice of the Peace—Contempt of Court—Arrest outside the Court for contempt committed in Court—14 & 15 Vict. c. 93 (Petty Sessions, Ireland, Act, 1851), s. 9—12 Vict. c. 16, s. 1.

Where, at Petty Sessions, a contempt committed in Court is brought to the notice of the justices there sitting, and, while the offender is still in Court, the justices order that he be attached to answer there and then for such alleged contempt, the mere fact that the order so made is carried out after the offender, in order to evade arrest, has left the Court, is not sufficient to render his arrest illegal.

MOTION to change verdict and judgment entered for the defendant at the trial into verdict and judgment for the plaintiff. The action was tried before Mr. Justice Johnson and a special jury at the county Antrim Summer Assizes, 1893.

The statement of claim alleged—1, That the defendant maliciously and without reasonable or probable cause procured and caused the plaintiff to be arrested by certain policemen in the

(1) Before HARRISON, GIBSON, and MADDEN, JJ.

Q. B. Div. 1893.

MITCHELL v. SMYTH.

town of Banbridge on the 24th November, 1892, and to be imprisoned and kept under arrest, both in the public street and in the Courthouse of Banbridge, whereby, &c.; and 2, that, the defendant assaulted the plaintiff and gave him into custody of certain policemen, and compelled him to be conducted along the public street of Banbridge in custody, and to be imprisoned, whereby the plaintiff was injured and exposed in his credit and circumstances: damages being laid at £200.

The defendant denied that he did the acts complained of; denied that it was maliciously or without reasonable or probable cause that he did the acts alleged; pleaded that on the day in question defendant was a Justice of the Peace for the county of Down, and was as such presiding in open Court at the Petty Sessions Court then being duly held in the town of Banbridge, in said county, and whilst the said Court was so sitting the defendant, without malice and on reasonable and probable grounds, *bona fide* believed that the plaintiff had then and there committed a contempt of the said Court, whereupon the defendant, as he had a right to do, ordered the plaintiff to be brought before the said Court, then sitting as aforesaid, and the plaintiff was thereupon brought before the said Court and given an opportunity of being heard before the said Court adjudicated on the said matter, which and no other were the acts complained of; and further pleaded that on the day, &c., whilst the said Court was so sitting the plaintiff committed a contempt of the said Court, whereupon the defendant, as he had a right to do, ordered the plaintiff to be brought before the said Court then sitting as aforesaid, and the plaintiff was thereupon brought before, &c. The defendant also pleaded not guilty by statute 12 Vict. c. 16.

The plaintiff in his reply joined issue, with further pleas that he did not commit a contempt of Court, and that by order of the defendant the plaintiff was arrested on the public street of the town of Banbridge, and the imprisonment of the plaintiff by order of the defendant commenced upon the public street and continued whilst plaintiff was being conducted under arrest to the Courthouse; and further, that no charge was entered upon the Court books against him after being brought back under arrest, and that he was further kept in the Courthouse in custody, and was released

from custody without any order or adjudication of the Court being made against him.

The facts of the case, as given in evidence at the trial, appear sufficiently from the judgment of Mr. Justice Harrison and from the findings of the jury, there being no very material conflict of testimony, except upon the point whether the plaintiff had actually passed the door of the Courthouse when the defendant, as presiding Justice, being informed that a contempt had been committed, gave the order that the plaintiff should be stopped or brought back.

At the conclusion of the evidence each side called for a direction.

The learned judge declined to direct for either side, though asked, and left to the jury the following questions:—.

1. Was plaintiff arrested in the Court, or outside the Courthouse in the street?—Answer, Arrested outside Court.

2. Did the District Inspector state to the defendant that a policeman who had been a witness in the plaintiff's case complained to him that he had been threatened by plaintiff?—Answer, Yes.

3. Did defendant himself believe that statement?—Answer, Yes.

4. Did defendant, when he ordered plaintiff to be brought back, and thereafter continuously till plaintiff finally left the Court, still believe that statement?—Answer, Yes.

5. Did defendant act with malice?—Answer, No.

6. Assess damages if plaintiff be entitled to recover in this action.—Answer, We assess the damages at sixpence.

When the jury had retired, but before they had returned, *Campbell, Q.C.*, for the defendant, put to his Lordship the following requisition, in writing:—

"I ask his Lordship to tell the jury that if, after the plaintiff had been guilty of contempt of Court, the order to detain him was given by the defendant before the plaintiff left the Court, but the plaintiff thereupon left Court to evade arrest, the police were justified in following him to arrest him in obedience to said order."

To this counsel for the plaintiff objected, and the learned judge declined so to instruct the jury.

Q. B. Div. 1893.

MITCHELL v. SMYTH.

The learned judge entered verdict and judgment for the defendant, with costs, upon the findings of the jury; and, counsel for the plaintiff having applied for the certificates necessary to entitle him to his costs, adjourned this application until the decision of the Divisional Court should have been given.

Craig, Q.C., Gordon, Q.C., and *W. H. Brown*, for the plaintiff:—

The question turns upon the effect of the concluding portion of section 9 of the Petty Sessions (Ireland) Act, 14 & 15 Vict. c. 93, which gives to Justices of the Peace a power to commit for contempt of Court. But this power is limited to contempts committed in Court, and does not authorize a Justice to order the arrest out of Court of a person alleged to have committed a contempt, or to summon him to appear to answer for such contempt. The contempt must be one committed in the Court, and immediately dealt with while the offender is in Court. The powers of County Court Judges are similarly limited: see 14 & 15 Vict. c. 57, s. 151: *Reg.* v. *Lefroy* (1); *Reg.* v. *Judge of Brompton County Court* (2).

Here the jury have found that the plaintiff had left the Court before he was arrested, and the plaintiff was therefore entitled to a verdict.

Serjeant Dodd, Campbell, Q.C., and *D. M. Wilson*, for the defendant:—

Assuming that the authority of a Justice in dealing with contempt is now governed wholly by the 9th section, the defendant is entitled to a verdict. The contempt was committed in the Court; the order to arrest the offending party was given while he was still (as we submit) in the Court, and was carried out forthwith. The whole matter was one continuous uninterrupted proceeding from beginning to end. The power which the section confers is not restricted to cases where the Justices see or hear the contempt themselves. If committed in the Court, and thereupon

(1) L. R. 8 Q. B. 134. (2) [1893] 2 Q. B. 195.

brought to their knowledge, they may call on the defendant to answer for his contempt, and necessarily for that purpose must have power to order that the person be not permitted to leave, or to stop him if attempting to leave the Court, or to bring him back if he have reached the door. This is not "arrest" in the legal sense of the term. The earlier law, as laid down by Dalton, supports this view.

Gordon, Q.C., in reply.

The common law power of a Justice to arrest or punish for contempt, if wider than the power given by the Petty Sessions Act, must be taken to have been so far superseded by the provisions of the 9th section. But, even if this be not so, the summary power of arrest, possessed by Justices previously to the Act of 1851, only extended to cases in which the Justice directed one in his presence to arrest another also in his presence: Dalton, cap. 169 (p. 439). Section 1 of 12 Vict. c. 16, is therefore no protection, for the defendant acted without jurisdiction: *Houlden* v. *Smith* (1); *Lawrenson* v. *Hill* (2); *Pease* v. *Chaytor* (3); *Calder* v. *Halket* (4); *Gwinne* v. *Poole* (5). The plaintiff had (as we submit upon the evidence) left the Court before the order to arrest him was given; and even if the order was given while the defendant was still in Court, it could not be carried into execution, legally, after he had passed the door of the Court. The plaintiff is at least entitled to nominal damages, unless a new trial be awarded.

[Counsel referred also to *Forbes* v. *Lloyd* (6), and *Johnson* v. *Meldon* (7).]

HARRISON, J.:— Nov. 8.

The plaintiff by his notice of motion in this case applies for an order to change the verdict and judgment entered for the defendant into a verdict and judgment for the plaintiff. There is no application for a new trial. The case has been very fully, carefully, and ably argued upon both sides.

(1) 10 Ir. C. L. R. 177.
(2) 14 A. & E. 841.
(3) 3 B. & S. 620.
(4) 3 Moo. P. C. 28.
(5) 2 Lutw. 1560.
(6) Ir. R. 10 C. L. 552.
(7) 30 L. R. Ir. 15.

Q. B. Div. 1893.

MITCHELL v. SMYTH.

Harrison, J.

The plaintiff Mitchell appeared at Banbridge Petty Sessions on the 24th November, 1892, before a bench of five Justices, to answer a summons for some alleged offence for having a dog at large without being muzzled. His case was that his dog was upon his own land, and he disputed the jurisdiction of the Justices, who, however, took a different view from defendant's, and imposed upon him a fine of 2*s*. 6*d*. The man appears to have been annoyed at the decision of the Justices.

Then, it seems, another case was called on. The plaintiff Mitchell was sitting,—Mr. Gordon has described the Courthouse to us,—at the end of the seat leading out to the passage into the hall, to the right of the Bench, while the Justices were sitting, I suppose, in a part which would correspond to the Bench here. The plaintiff walked forward,—the next case was going on at the time,—and threw down the two and sixpence. I do not say whether in so doing he jingled the money, or showed any disrespect, or not; but, as it would seem, he said something which the police and the District Inspector interpreted as a threat against the constable who had summoned him or given evidence against him.

Everybody must be clearly of opinion that this, if it occurred, was a contempt of Court. None of the magistrates apparently heard the words. Mr. Smyth, at all events, did not hear them. The police sergeant, who was standing near immediately informed the District Inspector of what the man had said—that he had threatened one of the witnesses. The magistrate, at all events, came to the conclusion, in his own mind, that a contempt of Court had been committed, and said, "Bring the man back," or "Stop him." This is the statement of the District Inspector. The plaintiff's case is that he had got out of the door, was not checked, did not hear what the Justice said, or what the District Inspector is supposed to have said, and went free away. The evidence of his own witnesses is that while he was going to the door the District Inspector or one of the constables called to him to come back, or said something with the object of preventing him from going out. Mitchell's case is that he got out into the street, and was going to his home, which was some short distance away, when a constable followed him, arrested him, and brought him back. Another case was going on at the time; he was asked to sit down; and when

the case was finished, he was called, and the magistrate said that he was sorry to see a person of Mr. Mitchell's respectability in such a position, and that two courses were open to him; he must either apologise for the contempt, or else the complaint against him must be investigated. Mitchell's solicitor intervened, and the result was that Mitchell apologised, saying that if he had acted with any contempt towards the magistrates he was sorry for it; he then went away. That is the whole case.

An action is now brought for arrest and false imprisonment; and it certainly seems a pity that such a small matter as this should be brought into Court. I am not going into any question as to the jurisdiction of Justices to commit for contempt before the passing of the Petty Sessions Act of 1851, as to what their powers would be as to arrest for contempt, or as to what remedies they might have had recourse to in order to preserve order and decency in their Court, and to punish for contempts. The present case depends upon that statute and upon the construction of the remedies given by the 9th section in cases of contempt as applied to the facts which I have stated.

The 9th section of the Petty Sessions Act (14 & 15 Vict. c. 93), after providing that the place in which Justices shall sit shall be deemed an open Court, to which the public generally may have access, so far as the same may conveniently contain them, except in proceedings for indictable offences, then goes on to enact:—"And if any person shall wilfully insult any Justice or Justices so sitting in any such Court or place, or shall commit any other contempt of any such Court, it shall be lawful for such Justice or Justices by any verbal order, either to direct such person to be removed from such Court or place, or to be taken into custody, and at any time before the rising of such Court, by warrant to commit such person to gaol for any period not exceeding seven days, or to fine such person in any sum not exceeding forty shillings."

That is the section. All the evidence in this case shows conclusively that a contempt was committed. What did the magistrate do? All the witnesses for the defence, except the plaintiff,—and the plaintiff cannot contradict the statement, for he says he did not hear it,—all the witnesses agree that something

Q. B. Div. 1893.

MITCHELL v. SMYTH.

Harrison, J.

was said by the magistrate to the District Inspector. The order was verbally given. The section says that the Justices may, by any verbal order, direct the person to be removed or to be taken into custody, &c. The order was in substance, "Bring that man back," or "Stop that man." At the moment when it was given Mitchell was in Court. He says that he did not hear the order, and that he was in the street when recalled. The witnesses for the defence say that Mitchell was stopped at the door, before he left the Court. The constables say that they put their hands upon him when still in Court, and that he wrenched himself away and got out, and constable Sproule says that he then got out and that he followed him. But the evidence, uncontradicted, was, I think, that the magistrate had given the order while Mitchell was in Court, even if he did not hear it.

That being an order which the magistrate had jurisdiction to make, I am of opinion that, as the constable contemporaneously and instantaneously proceeded to put into force that order, he was justified in acting as he did, and properly carried out an order properly made; and I am of opinion that it was not necessary that he should have completed the actual arrest strictly in the presence of the magistrate, and within the Court, if he did so as reasonably near to the moment when it was given as could be.

Now, at the close of the case, the questions which were left to the jury by the learned Judge were these:—(3) Did the defendant honestly believe the District Inspector's statement? [Answer, Yes.] (4) Did the defendant, when he ordered plaintiff to be brought back, and thenceforth continuously till the plaintiff ultimately left Court, still believe that statement? [Answer, Yes.] (5) Did defendant act with malice? [Answer, No.] These questions, put by the learned Judge, would appear to point to a defence raised under section 1 of the Protection of Justices Act, 1849 (12 Vict. c. 16), under which, in an action against a Justice of the Peace in respect of an act within his jurisdiction, the plaintiff must allege and prove malice and want of probable cause. This defence, no doubt, was present to the mind of the parties and to the learned Judge at the trial.

However, Mr. Campbell proceeded to ask the Judge, before the beginning of his charge, to tell the jury—and this requisition

was afterwards put in writing while the charge was being delivered, and we have the writing before us—that "if, after the plaintiff was guilty of contempt of Court, the order to detain him was given by the defendant before the plaintiff left the Court (and the facts are conclusive upon this), but the plaintiff thereupon left Court to evade arrest, the police were justified in following him to arrest him in obedience to said order."

Mr. Gordon objected to this, and the direction was not given, the learned Judge putting merely the questions which he had himself formulated. The jury found that the arrest was made in the street; and, when asked to estimate what damages they would give upon the assumption that the arrest was unjustifiable, they estimated them at sixpence.

We are now asked not to give a new trial, but to set aside the verdict and judgment, and to enter judgment for the plaintiff. But how would the Court be justified, upon the findings of the jury, in doing this? In my opinion we should not be justified in so doing. I think that the verdict was in substance correct, and that the order was practically carried out in the Court, if this be the meaning of the 9th section.

We must have regard to the circumstances of the case. Another case was at hearing; the magistrate could not stop all business or interrupt the case which was at hearing; he gives his verbal order, "Stop that man," and proceeds with the case on which he is engaged; a constable goes for the man, stops him, takes him into custody, carrying out an order made under the powers given by section 9, as he was entitled to do, and brings him back. When the magistrate is disengaged the man is given the option of apologising or of having an inquiry made into the complaint; he chooses the former course, and apologises, thus avoiding a charge which might have entailed serious consequences. Under these circumstances it is idle to argue that the plaintiff is entitled to have the judgment entered for him. The application must be refused.

GIBSON, J.:—

I concur, so far as the main result is concerned. The claim, so far as founded on malice and absence of probable cause, has

Q. B. Div. 1893.

MITCHELL v. SMYTH.

Gibson, J.

been abandoned; and in the arguments addressed to us, the action has been treated as conversant with trespass and false imprisonment only.

A number of questions of fact were put to the jury; but before us there have been several new controversial questions suggested upon which the plaintiff claims that the jury should have found in his favour, and which must now, it is said, be accepted by the Court as established.

It would be impossible for this Court to allow verdict and judgment to be entered for the plaintiff on the findings, having regard to the course of the trial. The utmost to which he could be entitled would be a new trial, and it would be out of the question for us to award a new trial in a case where the damages were so small — where substantial justice was done. There are a number of authorities upon this point which I do not deem it necessary now to discuss.

At the close of the case Mr. Campbell made a requisition. It was a pointed one, and right, and I think essential to the proper trial of the case. From the way in which it was dealt with by Mr. Gordon, I understand that there was no dispute as to the material facts contained in Mr. Campbell's requisition, but that he altogether disputed, as he has done before us, the proposition of law upon which Mr. Campbell insisted. That proposition fairly represented, I think, the section of the statute, under which, in my opinion, where such an oral order as this is made, it should be made contemporaneously, and in the presence of the person sought to be affected thereby. Simultaneity is the essence of this section; and I should be sorry if it was thought that, after a man had gone away, a magistrate would be at liberty to send after him, and to proceed thereupon to adjudicate on an alleged contempt.

The passage in *Dalton* (1) stating that one may not in the absence of a Justice arrest upon his command by parol, proceeds upon one of the clearest principles of the criminal law. The principle is this, that every officer who deprives a person of liberty is bound to show his authority, so that the other may know whether to resist or obey; and so far does this go that,

(1) Cap. 169, sects. 1 and 2, p. 439 (ed. 1715).

where a warrant has been issued to an officer for an offence less than felony, the officer who executes it must have it in his possession at the time of arrest. In my opinion it would be a dangerous extension of this section if it was to be laid down that an order for arrest, made orally behind a man's back, could be put into execution outside the limits of the Court.

But in the present case the order was made in the plaintiff's presence, whether he heard it or not; and the magistrate intended it to be carried out in his presence and in the Court. Mitchell was told not to leave the Court, and he should have obeyed the admonition of the officer, and have remained. Under all the circumstances of the case, I am of opinion that the arrest was practically contemporaneous with the contempt. The order was certainly, I think, made in the man's presence, even if it did not reach his ears,—a matter which, if I had been upon the jury, I should have been slow to find in the plaintiff's favour.

But, even for a moment supposing, as was pressed by Mr. Gordon in his excellent argument, that there was some irregularity in effecting the arrest out of Court, I am of opinion that, under 12 Vict. c. 16, the magistrate would be protected; he made a right order within his jurisdiction, and intended that it should be executed there and then in Court; and even if the police were guilty of irregularity, that would not affect the position of the magistrate, if, in making the order, he was acting within his jurisdiction.

I concur with Mr. Justice Harrison that the case appears to be a singularly unmeritorious one. How it was ever launched I fail to understand.

MADDEN, J.:—

I concur, and only add a few words out of respect for the argument, so strongly pressed by Mr. Gordon. He referred to *Dalton* as an authority for the proposition that, at common law, where a Justice of the Peace, in the exercise of his summary jurisdiction, orders the arrest of a person in his presence by word of mouth, the arrest must be carried out and finally consummated in the presence of the Justice; and he contended that, in construing the 9th section of the Petty Sessions (Ireland) Act—which gives

Q. B. Div. 1893.

MITCHELL v. SMYTH.

Madden, J.

to Justices at Petty Sessions certain powers in cases of contempt —their statutory power of arrest should not receive a more extended operation than that which was by the common law vested in a Justice.

A careful examination of the passage to which Mr. Gordon referred (1) shows that it has no application to an arrest under the section now before us. The reason why, in the case put by *Dalton*, the arrest must be made in the presence of the Justice is because it was considered to be an act done by the Justice himself by virtue of his common law power of arrest. But where the Justice possessed at common law a power of deputing by word of mouth this power of arrest to his servants, or to the *posse comitatus* (as in the case of a riot reported to the Justice as conservator of the peace), then, according to the same authority, it was not necessary to have the order carried out and consummated in his presence (2).

The 9th section, in express terms, gives to Justices a power by word of mouth to order another person to take an offender into custody in cases of contempt committed in Court. The arrest is not supposed to be effected by the Justice himself, and if the analogy of the common law is to be called in aid, it is against Mr. Gordon's contention.

I entirely concur in the view of this section taken by the other members of the Court. It was designed to preserve the decorum and order of proceedings in Court; and the powers which it gives were intended to apply to contempts of Court committed in Court, and to be put into operation immediately or as soon as possible after such an occurrence. But here the offence was committed in Court, and the order was made in the presence of the alleged offender, and immediately after the words were spoken, or as soon as the attention of the Justice was called to what had occurred.

Mr. Gordon has placed his argument upon the only basis upon which it could rest, namely, that the mere fact that the order so made was carried out and consummated outside the Court was in itself sufficient to vitiate the whole proceeding. If he were correct in this, his client would be entitled to have the verdict

(1) Dalton, cap. 169, sect. 1.
(2) Dalton, cap. 82, sects. 1, 2, 3 (ed. 1715), pp. 194, 195; Dalton, cap. 169, sect. 1.

changed; but I am of opinion that there is no such principle as that for which he contends, and that the authorities to which he referred do not establish the proposition that, where a Justice, either at common law or by statute, is empowered to order the arrest of an offender, the whole proceeding, culminating in the actual arrest, must be carried out in the presence of the Justice. I am aware of no authority for such a proposition; and such a construction would render the provisions of the section nugatory in a state of circumstances which can easily be suggested, and of which the present case affords an illustration.

Q. B. Div. 1893. MITCHELL v. SMYTH. Madden, J.

Solicitor for the plaintiff: *Cunningham & Crothers.*
Solicitor for the defendant: *A. M'Clelland.*

A. E. R. J.

IN RE BROWN (1).

Q. B. Div 1894. March 9.

Licensing Act, 1872, *sects.* 3, 51—*Non-payment of penalty—Imprisonment—Distress—Warrant—Dublin Police Act* (5 *Vict. sess.* 2, *c.* 24).

A person was convicted under the Licensing Act, 1872, section 3, for selling porter without a license, and fined £25. Upon non-payment of the fine a magistrate issued a warrant to a constable to distrain the defendant's goods, and in default of distress to lodge the defendant in prison to be imprisoned for two calendar months, unless the fine be sooner paid:—

Held, that the imprisonment was legal.

APPLICATION on behalf of Sarah Brown, a prisoner undergoing a sentence of two months' imprisonment for an infringement of the Licensing Act, 1872, for writs of *habeas corpus* and *certiorari*, on the ground that the prisoner's conviction was bad in law, and that the warrant of committal imposed a term of imprisonment in excess of that allowed by Act of Parliament, and that the said imprisonment was illegal, inasmuch as the provisions of the Act as to distress were not complied with. By direction of the learned

(1) Before WARREN, J., sitting to hear motions for the Division.

Q. B. Div. 1894.

In re BROWN.

Judge notice of the application was served on the Chief Crown Solicitor.

From the affidavit of Mr. R. G. Hamill, solicitor for the applicant, it appeared that she was summoned before one of the Divisional Magistrates on the 30th September, 1893, for selling by retail porter on unlicensed premises, and convicted of the offence, whereupon the magistrate imposed a penalty of £25. The fine being left unpaid, the magistrate issued a warrant, dated the 3rd February, 1894, directed to a police constable of the Metropolitan Police District, which, after reciting the order of conviction of the 30th September, 1893, and that it had not been complied with, proceeded in the following words:—"This is to command you to whom this warrant is addressed to execute the said order against the said defendant" (the present applicant), "as follows: To levy said sum by distress and sale of defendant's goods, and, in default of distress, to lodge defendant in Grangegorman Prison, in said district, to be imprisoned there for the period of two calendar months, unless said sum be sooner paid."

On the 7th February, 1894, the applicant was arrested, and was now in prison.

Patrick Power, the constable to whom the warrant was directed, made an affidavit stating that the applicant refused to pay the fine, and that she had no goods available for distress.

E. A. Ennis, in support of the application:—

First, the term of imprisonment is excessive. By the 35 & 36 Vict. c. 94, sect. 3, the imprisonment which can be inflicted for a first offence is not to exceed one month. The 51st section, sub-section 2, was held not to apply to a case of this kind: *Re Brown* (1), *per* Cockburn, C.J. Secondly, no distress was ordered before the warrant of committal, and no return of *nulla bona* was previously made: *Re Brown* (1); *In re Clew* (2). In those cases the effect of the incorporation of Jervis' Act (11 & 12 Vict. c. 43, sect. 16), by the 51st sect. was considered; but it was held that as the section of Jervis' Act was thereby incorporated subject to the subsequent provisions of the 51st sect., including sub-sect. 2, an

(1) 3 Q. B. Div. 545. (2) 8 Q. B. Div. 511.

order for distress was a condition precedent to the exercise of the power of imprisonment.

Q. B. Div. 1894.

In re BROWN.

Thomas Wall and *G. D. Keogh*, for the Crown:—

Reg. v. *Hopkins* (1) is a distinct authority for the course taken here by the magistrate. In that case *In re Brown* (2) was cited, but the Court declined to adopt the view taken by Cockburn, C.J. The Dublin Police Act (5 Vict. sess. 2, c. 24), sect. 39 is in the same terms as sect. 77 of the London Act (2 & 3 Vict. c. 47), upon which *Reg.* v. *Hopkins* (1) was decided.

WARREN, J., refused the motion.

Solicitor for the applicant: *Hamill.*
Solicitor for the Crown: *P. Coll.*

W. G.

THOMPSON *v.* BUCHANAN AND TORISH (3).

Appeal. 1893. Nov. 17. Dec. 1, 13.

Parliamentary franchise—Inhabitant householder—Death of tenant intestate—Occupation by next-of-kin—Acceptance of one as tenant by landlord—Occupation as tenant—Joint or sole occupation.

The tenant of the qualifying premises died intestate in 1856, leaving a widow, two sons, and two daughters, his next-of-kin, in occupation. No administration was taken out to the father. The widow paid the rent for some years, and was treated as tenant by the landlord. She died intestate. No administration was taken out to her, but her four children continued in occupation of the premises, the eldest son paying the rent and getting the receipts in his own name. In 1876 the eldest son assigned his interest to his brother, on terms that he should be supported on the premises. The eldest son died some years ago, but he had been living on the premises until his death. The second son, after the assignment from his brother, paid the rent, and was treated by the landlord as the tenant, but his two sisters continued to live, as they had previously done, with him on the premises. No evidence was offered

(1) [1893] 1 Q. B. 621. (2) 3 Q. B. Div. 545.

(3) Before SIR PETER O'BRIEN, C.J., PORTER, M.R., PALLES, C.B., and FITZ GIBBON and BARRY, L.JJ.

Appeal. 1893.

THOMPSON v. BUCHANAN.

that they had abandoned their claims on the assets of which their father and mother had died in possession :—

Held **(affirming the decision of the Revising Barrister), FitzGibbon, L.J., *diss.*, that the second son was not entitled to the franchise as inhabitant householder in respect of the premises.**

APPEAL by Joseph Thompson against the decision of Mr. Cuming, one of the Revising Barristers for the North Tyrone Division, declaring the appellant not entitled to the franchise.

The facts appear from the case stated, which was as follows :—

"At a Court in the said Division, held before me, &c., the name of the said appellant appeared as an inhabitant householder on the register of voters for the Strabane polling district of the said Division, and was duly objected to by the said second respondent.

"The appellant deposed that his father died intestate about 1856, he being then tenant under one contract of tenancy from year to year, of the house and farm (out of which house appellant claimed), and leaving as his next-of-kin residing in the said house and farm his widow and two daughters and two sons; that the widow's name was entered in the rent-books as tenant of the house and farm, and the rent receipts were given in her name; that she died intestate about twenty-five years ago; that then the name of the eldest son was entered in the rent-books as tenant of the said house and farm, and the rent receipts were given in his name; that being an invalid, he, by agreement (produced and proved) dated 1876, purported to assign the said house and farm to the appellant on the terms that the appellant should support and maintain him on the farm during his life; that he died over ten years ago. At the date of that agreement one of the appellant's sisters was thirty years of age, the other not quite twenty-one; that the appellant's name has been in the rent-books as tenant of the farm, and the rent receipts given in his name since the gale-day next after the date of the said agreement. No administration was ever taken out to either the father or mother of appellant.

"The case stood adjourned by me to allow of the production of the sisters, or either of them, to prove that they or either of them had released or abandoned their claims on, or interest in, the said estates or farm. Neither attended. Both reside still in the house and on the farm as before, and have always been so residing.

"The objector contends that the persons whose names were entered as tenants, or to whom receipts were given, were mere trustees of those beneficially entitled, and that the beneficiaries were in actual possession of the premises.

"I held that these alleged changes of tenancy only amounted to the creation of tenancies by estoppel, as between the landlord and those whose names he, from time to time, entered as tenants in his books, and did not amount to changes of tenancy or ownership as between the members of the family, and that as the sisters were still occupying the premises, without having abandoned their claims or interests in the farm, the appellant was not occupying as sole inhabitant occupier or householder. In all other respects he was entitled to a vote.

"If I am wrong in this the name of the appellant is to be reinstated as a voter in the said list."

The appeal, which had been argued on November 17, 1893, was, by direction of the Court, re-argued on December 1, 1893.

Ross, Q.C., for appellant.

Healy and *M. J. Kenny*, for respondent.

SIR PETER O'BRIEN, C.J. :— Dec. 13.

Thompson claimed as an inhabitant householder, and the material facts are as follows;—Thompson's father held a house and farm. He died intestate about 1856, being tenant under one tenancy of house and farm. He left after him a widow and two sons and two daughters. The widow got her name entered in the rent-books as tenant. She died intestate, and her eldest son got his name entered in the rent-books as tenant of the house and farm. He, being an invalid, purported, by an agreement which was produced, to assign his interest to his brother the claimant, who paid the rent and got receipts in his own name. When these facts were established before the Revising Barrister he allowed the case to stand over for the production of the sisters of the claimant to prove that they had released or abandoned their claim to, or interest in, the farm. They were not produced. The Revising Barrister held that the alleged changes

Appeal. 1893.

THOMPSON v. BUCHANAN.

Sir P. O'Brien, C.J.

in the tenancy did not amount to a change of tenancy or ownership as between the members of the family, and that as they were still occupying the premises, without having abandoned their claims or interest in the farm, the appellant was not occupying as sole inhabitant occupier or householder. I think there was evidence to sustain his finding. The sisters had an interest in the house and farm, to use the words of Lord Cairns in *Cooper* v. *Cooper* (1), *in specie*, and they were in actual occupation. This, in my opinion, justified the finding that there was no sole occupation.

Brewer v. *M'Gowan* (2) has been referred to; but that was a case where the claimant had a strictly legal title, and was sought to be disqualified by the fact that there was a lodger in the house; and in giving judgment in that case, Lord Esher, then Mr. Justice Brett, said:—"When, therefore, the new statute conferred the franchise on occupiers of dwelling-houses irrespective of value, it might have been contended that any number of joint occupiers would be entitled to be registered under it, which would have given the vote to many persons upon whom it was never contemplated the franchise should be conferred. The proviso (to the 3rd section) was, therefore, introduced for the purpose of confining the right to those who were sole occupiers of dwelling-houses in a borough." I cannot hold that the claimant is sole occupier, when, as between him and his sisters, the latter, who are in occupation, have as good a right to it as he (the claimant) has. *Lancaster* v. *Smith* (3) is also distinguishable. That was a case where the claimant had a strictly legal title, though he had sublet certain rooms of a set of chambers in the Temple. He retained the general mastership and control of the whole set of rooms, and resided there himself. Mr. Justice Willes' judgment in the case is a valuable one. This retention of the mastership and control was the principal ground of the judgment. Mr. Justice Willes added: "The demise in such a case is not like the ordinary demises to a tenant, who may use the place for any purpose he may think proper. It is limited to the individual, and to such an occupation as is usual in an Inn of Court. The position of an occupant very much resembles an occupation by a man as a licensee, or as a guest

(1) L. R. 7 H. L. 53. (2) L. R. 5 C. P. 239. (3) *Ibid.* 246.

in an inn, or at highest that sort of qualified right which was held by Hill, J., in *Smith* v. *The Overseers of St. Michael, Cambridge* (1), not to interfere with the grantor's occupation of the whole house." In the authority here referred to Mr. Justice Hill is reported to have said (2) :—"It is true, the exclusive enjoyment of the rooms is to be given; but that is the case where a guest in an inn, or a lodger in a house has a separate apartment, or where a passenger in a ship has a separate cabin: in which case it is clear the possession remains in the innkeeper, lodging-house keeper, or shipowner." In my opinion there is no analogy between the sisters in this case and a lodger or guest in an inn. The former had, in the present instance, an interest in the subject-matter of the tenancy *in specie*. I have referred, in *Gormley's Case* (3), at some length, to the judgment of Lord Cairns in *Cooper* v. *Cooper* (4), and it is not necessary to refer again to it here. I am of opinion the decision of the Revising Barrister must be affirmed.

PORTER, M.R. :—

I concur. I think the decision in this case necessarily follows from the judgments given in the other cases. If it were not for the agreement here between the claimant and his elder brother this case would be undistinguishable from the others. The case might have been different if the claimant and his elder brother were the only two persons interested in the farm; but they were not. The right to the farm was shared by their sisters, who were also in occupation. The agreement did not affect the sisters' rights, and there is no evidence of any transaction by which their claims were either relinquished or discharged. Suppose that the other members of the family had signed an agreement in writing that the voter should be tenant, and that they should remain on as before, with a complete reservation of their rights as next-of-kin in respect of the holding. Such an arrangement would have been consistent with all the facts proved in this case. It is impossible, therefore, to say that the finding which practically decides that there was such an arrangement, though not in writing, is contrary to the evidence.

(1) 3 E. & E. 383.
(2) *Ibid.* at p. 390.
(3) *Ante*, p. 299.
(4) L. R. 7 H. L. 53.

Appeal.
1893.
THOMPSON
v.
BUCHANAN.

PALLES, C.B. :—

I am of opinion that it was a question of fact whether the sisters consented to the recognition of the appellant as tenant, and relinquished their claims on the farm. I hold myself bound by the finding of the Revising Barrister upon that question.

FITZ GIBBON, L.J. :—

It is unnecessary for me to repeat what I have said in the other cases, in which I have been unable to concur with the other members of the Court. I cannot see any ground upon which the franchise could be given to the claimant in this case, when it has been denied to *Gormley* (1) and to *Brown* (2); and, being unable distinguish the previous decisions, I am not at liberty to resist their application to this as a similar case; but I must mention the facts, and point out how very far we are going.

The franchise claimed is that of an inhabitant householder. The claimant's father was the sole tenant and occupier of the qualifying premises until he died, thirty-six years ago. At his death he left his widow, two sons, and two daughters, all living in the place together. One daughter was then about ten years of age, and the other was an infant. The only statement as to the daughters is that they "reside still in the house and on the farm as before, and have always been so residing." The father died intestate. No administration was taken out to him; but immediately after his death his widow was entered in the landlord's books as tenant. She presumably paid the rent during her time, and reared her daughters as children and not as joint tenants. She died intestate twenty-five years ago, having been for eleven years the recognized tenant. No administration was taken out to her, but on her death the landlord took her eldest son, the claimant's brother, as tenant. The sisters lived on in the place as before. The next step in the title is remarkable and important, and is categorically stated on the case. The claimant, though he was just as much one of the next-of-kin of his father, the original tenant, and of his mother, as were his brother and his sisters, and though he had inhabited the place along with them all through, seems to me to have supplied undeniable evidence that he at least

(1) *Ante*, p. 299. (2) *Ante*, p. 318.

had assented to his mother's and his brother's tenancies, to his own exclusion, for he took an assignment of the tenancy from his brother, on the terms that his brother was to be supported in the house for his life, and he was so supported till his death, which occurred ten years ago. Ever since the assignment, the claimant alone has been the recognized tenant, and has been in occupation; yet he is now held not to be the inhabitant occupier, because his sisters are living with him.

The occupation which displaces Joseph Thompson, claiming as assignee of the tenancy, the title of which I have traced for thirty-six years since his father's death, therefore, is the residence with him of two middle-aged sisters, who never acted as tenants or owners, who, at the commencement of that period, were a girl of ten and an infant in arms, and who must, during all their lives, have been aware that they were not recognized as tenants; who never paid any rent or taxes; and who knew that their mother and their two brothers in succession occupied "as tenants," while they themselves did not.

As this is a case of the "Inhabitant Occupier's" franchise, the decision seems to me to be open to the additional objection that it ignores the direction contained in the Registration Act, 1885, Schedule I., Form 34, Instruction (*d.*): "The head of the family alone is considered to be the occupier," which instruction is to "have effect as if enacted in the body of the Act"—(41 & 42 Vict. cap. 26, sect. 8; 48 Vict. cap. 17, sect. 3.)

But I am bound by the previous decisions, from which I dissented, and I agree with the Master of the Rolls that this one necessarily follows from them.

BARRY, L.J.:—

If I were a juror it is possible that I should be carried away by the very able argument of my brother Fitz Gibbon; but, having regard to our previous decisions, we must approximate as much as we can to something like a certain rule, and hold that as the Barrister had evidence to support his finding we cannot disturb it.

Solicitor for the appellant: *Wilson.*

Solicitors for the respondent: *Todd & O'Meara.*

G. Y. D.

Appeal.
1893.

TORISH *v.* LOVE (1).

Nov. 16.
Dec. 14.

Parliamentary franchise—Inhabitant householder—Qualifying premises devised by tenant to his son, subject to right of widow to reside therein—Joint or sole occupation.

The deceased yearly tenant of a house and farm devised his tenancy to his son, giving, by his will, a right to his widow to reside in the house, so long as the son was unmarried. The son was still unmarried, and the widow was still residing in the house. In all other respects the son was qualified as an inhabitant householder in respect of the premises:—

Held (affirming the decision of the Revising Barrister), that the son was entitled to the franchise.

The mere fact that another person has an incorporeal right to reside in the house of which he is tenant does not disqualify for the franchise as inhabitant householder an otherwise qualified tenant of the house.

APPEAL by the objector against the decision of Mr. Cuming, Revising Barrister for the North Tyrone Division, declaring the respondent entitled to the franchise.

The facts appear from the case stated, which was as follows:—

"At a Court held in said Division of said county by me, one of the Revising Barristers appointed to revise the lists of voters of said Division and County the name of said John Love appeared on the register for Donemanagh polling district of said Division and County and was duly objected to by said appellant.

"Respondent produced and deposed. 'My father's name was Victor. He died six years ago. With my father's consent I bought out, in my own name, under Lord Ashbourne's Act, in my father's lifetime. My father's will (produced) leaves me the house and farm, and provides that my mother is to reside in the house while I remain single.' [The words of the will were, 'my wife is to remain in the house while my son remains single.'] 'I am single, and she so resides ever since his death.'

(1) Before SIR PETER O'BRIEN, C.J., PALLES, C.B., and FITZ GIBBON and BARRY, L.JJ.

"I held that the provision in the will and the residence of the mother in the house did not prevent the son from being entitled to a vote thereout.

"I held that the farm passed by the father's will, that the evidence that the respondent had purchased the farm in his own name did not satisfy me that he had purchased the same so as to become owner in the father's lifetime.

"The deed was not produced.

"If I am wrong in holding that respondent is entitled to a vote his name is to be struck out of said list otherwise to remain on."

Healy and *M. J. Kenny*, for the appellant.

Ross, Q.C., for the respondent.

Cur. adv. vult.

Dec. 14.

Per Curiam. The words of the will give the widow an incorporeal right to reside in the house, but do not confer upon her any estate in the house or any part of it. Therefore the mother's residence under this provision did not prevent the son being the sole inhabitant occupier as tenant: *Brewer* v. *M'Gowan* (1). The decision must be affirmed (2).

Solicitors for the appellant: *Todd & O'Meara.*
Solicitor for the respondent: *Wilson.*

G. Y. D.

(1) L. R. 5 C. P. 239.

(2) In *Torish* v. *Brown* (17th November, 1893), another case decided by the same Revising Barrister, a testator by his will devised his farm and house to his son, but he added, "I give this room to my wife as a dwelling-house." He also gave some money legacies to his daughters, and finally directed "that all were to live together and manage as before." The mother and sisters continued to live with the son as one family after the testator's death. The Revising Barrister held that the son, who was the respondent in the appeal, occupied the house as tenant, and was not deprived of his right to vote as an inhabitant householder by reason of his mother being entitled to and occupying the room, or by reason of his sisters being entitled to live and living in the house with him.

Healy and *M. J. Kenny*, for the appellant.

Appeal. 1893.

TORISH v. LOVE.

Ross, Q.C., for the respondent.

THE COURT OF APPEAL reversed the decision of the Revising Barrister, being of opinion that there was a devise of the room to the widow, and that she had more than a mere incorporeal right to reside in the house.

Solicitors for the appellant: *Todd & O'Meara.*

Solicitor for the respondent: *Wilson.*

G. Y. D.

Appeal. 1893.

Nov. 7, 8. Dec. 14.

MOONEY *v.* CHAMBERS (1).

Parliamentary franchise—Joint rated occupiers—Premises taken solely to obtain votes—Occasionality—Sole occupation—Occupation of sub-tenant or licensee.

Prior to March, 1892, two sons lived with their father in premises of which he was the tenant, and which it became desirable to take down and rebuild. In March, 1892, it was arranged that the sons should become the joint tenants of other premises, and be jointly rated in respect of the same, in order to qualify themselves for the franchise. As soon as the arrangement was completed the father and the two sons moved into the premises, of which the sons thus became the tenants, and resided there till August, 1893, when all three moved back into the premises of which the father was tenant, and which had been rebuilt in the interval. The sons paid the rent and poor-rates of the premises of which they were the tenants, but the father was surety for the payment of the rent, and paid all the household expenses of the establishment, including the maintenance of his two sons. The Revising Barrister held that the arrangement for obtaining the tenancy of the house in the names of the sons was not *bona fide*, and that the father was the sole occupier of the house, and disallowed the votes:—

Held (reversing the Revising Barrister), that the sons were entitled to the franchise as joint rated occupiers of the premises of which they were tenants.

APPEAL by Frederick G. Mooney and William C. Mooney against the decision of Mr. Wylie, one of the Revising Barristers for the borough of Londonderry, declaring them not entitled to the franchise.

The facts appear from the case stated, which was as follows:—

(1) Before SIR PETER O'BRIEN, C.J., PALLES, C.B., and FITZGIBBON and BARRY, L.JJ.

"The names of Frederick G. Mooney and William C. Mooney appeared on the Town Clerk's list of voters for the North Division of the borough of Londonderry, as joint rated occupiers, the one with the other of a house, office, and yard, 16, Clarendon-street, in said borough, and were duly objected to.

It appeared in evidence that the said Frederick G. Mooney and William C. Mooney are sons of William Mooney of Waterloo-place, in the city of Londonderry, and are both clerks, one in the employment of his father in his business at Waterloo-place, and the other in the employment of another merchant in Londonderry: that prior to March, 1892, they both lived with their father in his dwelling-house over his shop in Waterloo-place, and paid him out of their salaries a sum for board and lodging. In March, 1892, as the said William Mooney intended to pull down and rebuild his said house in Waterloo-place, it was arranged between him and his said two sons that they, his sons, should take over from the former tenant of the said house and premises, 16, Clarendon-street, his interest therein up to the 1st May, 1892, and afterwards take the said house in their names as tenants direct from the landlord.

The arrangement for said transfer from the former tenant having been carried out, the said William Mooney, in March, 1892, removed with his family, including said two sons, from Waterloo-place to said house, 16, Clarendon-street, taking with him all his furniture, save some old things that were sold and replaced by new, and resided in said last-mentioned house with his wife and family, including said two sons, who were unmarried.

While said two sons so lived with their father in 16, Clarendon-street aforesaid, they paid nothing to their father for board or lodging, but paid in lieu thereof the rent and taxes of said house. The said William Mooney supported his family, including said two sons, in said house in Clarendon-street, and paid all the household expenses in the same manner as he had done prior to March, 1892, and has done since the beginning of August, 1893, in Waterloo-place, save that in lieu of paying a sum for board and lodging the said two sons paid the rent and taxes. The said William Mooney removed back to the new house in Waterloo-place, with his wife and family, including said two sons, about the beginning of

Appeal. 1893.

MOONEY v. CHAMBERS.

August, 1893, and has since resided there. The negotiations for the letting of the said house, 16, Clarendon-street, were commenced between the said William Mooney and the agent of the property, and the said house was afterwards let to the said Frederick G. Mooney and William C. Mooney, upon their father, on the 10th June, 1892, giving a written guarantee for the payment of the rent, and they obtained receipts for the rent in their joint names.

It was admitted that the sole object of the parties in taking the said house, 16, Clarendon-street, in the names of Frederick G. Mooney and William C. Mooney was to enable them to obtain votes for a member of Parliament for said borough.

The said Frederick G. Mooney and William C. Mooney were jointly rated for the said house, the annual value of which is £25.

It was contended on behalf of the said Frederick G. Mooney and William C. Mooney that they were the tenants of the said house, and being jointly rated for the same, and having paid the rent and taxes thereof, they were entitled to have their names retained on the list of voters as rated occupiers of the said house.

From the facts above stated, and the evidence of the said William Mooney and Frederick G. Mooney, I was of opinion, and found as a fact, that the arrangement for obtaining the tenancy of the said house, 16, Clarendon-street, in the names of the said Frederick G. Mooney and William C. Mooney, was not *bona fide*.

And I also inferred, and found, as a fact, that neither the said Frederick G. Mooney nor William C. Mooney was an occupier of the said house, but that the sole occupier thereof was the said William Mooney, and I accordingly expunged the names of the said Frederick G. Mooney and William C. Mooney from the list of voters.

If the Court should be of opinion that I was wrong in so finding the names of the said Frederick G. Mooney and William C. Mooney should be restored to the said list."

Ross, Q.C., and *Cooke*, for the appellants.

Healy and *M. J. Kenny*, for the respondent.

Cur. adv. vult.

Appeal.
1893.
MOONEY
v.
CHAMBERS.
Dec. 14.

SIR PETER O'BRIEN, C. J.:—

[His Lordship read the case and continued.] The case thus states that the two claimants were made the regular legal tenants of this house, of which they were jointed rated occupiers. It also states that they were the tenants and occupied as such during the whole qualifying period, and that they had paid the rent and rates. It was admitted that the sole object of the parties in becoming the tenants of the house was to enable them to obtain votes for the borough of Londonderry. Now, if the Revising Barrister came to the conclusion that the arrangement was not *bona fide*, because it was made for the purpose of getting votes for the two young men, I cannot concur in this view. There is nothing illegal, or improper, or against public policy in entering into an arrangement with the intention of obtaining a vote. An arrangement made with this intention involves no want of *bona fides*—no *mala fides*.

It occurred to me, as I stated more than once during the argument, that what might have been passing in the mind of the learned Revising Barrister was the idea that though there was a tenancy between the two sons and the landlord, yet there was a sub-tenancy, or possibly the relation of trustees and *cestui que trust* between the sons and the father, and that a sole occupation in the father existed in reference to either of these relations; upon consideration, but not without some difficulty, I have arrived at the conclusion that facts to support such an inference are not stated. The finding of the learned Revising Barrister that the father was the sole occupier is not sustained by the facts which he has set out. The occupation of the father was, upon the facts stated, that of a lodger, and it cannot oust the occupation of the two sons, who were strictly the legal tenants.

I am of opinion that the decision is wrong, and it must be reversed.

PALLES, C. B.:—

The question is whether the facts found show *per se*, and without any inference of fact, that the occupation was in the appellants as tenants. They became legal tenants to the landlord of

Appeal. 1893.

MOONEY v. CHAMBERS.

Palles, C.B.

the house constituting the qualifying premises, paid the rent, and resided in it. They had in them the entire estate, legal and equitable, in the tenancy. They had the whole right to the occupation, and in this respect the case differs from those decided in reference to the occupation of several next-of-kin. I think that as matter of law the occupation must be attributed to the title, and that it constituted occupation by the claimants as tenants, unless there is evidence that they created a sub-tenancy between themselves and their father. The *onus* of proving this lay on the objector. The question, therefore, is, Is there any legal evidence of the creation of such a sub-tenancy? Facts which are as consistent with the father being in as licensee as with his being sub-tenant cannot *per se* be evidence of a sub-tenancy. Everything proved is as consistent with an agreement that the sons should permit the father to reside in the house as licensee, and have his family and furniture there, without having any *interest* in the house itself, as with there being a sub-tenancy.

The appeal should, therefore, be allowed.

FITZ GIBBON, L.J.:—

The father had no relation whatever to the qualifying premises until after they had been let to the sons, and it was only by virtue of the letting to the sons that the father had any connection with the place. The landlord took the sons, and not the father, as his tenants, and the father was surety, not tenant, to the landlord. The Revising Barrister says:—"From the facts above stated, and the evidence of the said William Mooney, and Frederick G. Mooney, I was of opinion, and found as a fact, that the arrangement for obtaining the tenancy of the said house, 16, Clarendon-street, in the names of the said Frederick G. Mooney and William C. Mooney, was not *bona fide*." But he also finds, "as a fact," that the object of the arrangement was to get votes for the sons, and as he had previously stated that the sons were the tenants, and the father was the surety to the landlord, this Revising Barrister makes it clear that the basis of his decision is his opinion that an arrangement to get votes by taking a tenancy is, in itself, "*mala fide*," whatever that may mean.

Mr. Teeling, in another case in the same borough, held that though such a motive exists there may be a *bona fide* acquisition of qualifying property, and his decision was affirmed. In point of law, there is nothing against such an arrangement, and the proper question is not whether the qualifying property was acquired with the motive of obtaining a vote, but whether it was acquired in fact.

Upon this question the Revising Barrister states the inference of fact which he drew from the evidence. "I also inferred and found as a fact that neither the said Frederick G. Mooney nor William C. Mooney was an occupier of the said house, but that *the sole occupier thereof was the said William Mooney.*" That is to say, he finds "as a fact" that the two young men who were residing on the premises, of which they were the tenants, paying the rent—one out of his earnings in his father's establishment, and the other out of his earnings elsewhere, but both out of their own money—were not there at all, and that their father, who came to live with his sons in premises of which they were the tenants, was the sole occupier as tenant, for the franchise requires occupation "as tenant," and looks to such occupation only.

I agree with the Lord Chief Baron that the decision cannot be supported, unless we can spell out some evidence either that the sons sublet the premises to their father, and did not retain the qualifying occupation as tenants in themselves, or that the father was the sole beneficial owner and *cestui que trust* of the tenancy, and the sons mere trustees for him. But neither of these suppositions is consistent with the facts which the Revising Barrister has set out, for he has found that the sons were in fact tenants, as between themselves and the landlord, that they lived in the qualifying premises, and that they paid the rent, though, as between themselves and their father, the object of the arrangement was to give them votes in respect of their occupation.

I disapprove of the notion that Revising Barristers are to pry into motives, and, if they can discover that the purpose of getting votes has led to arrangements otherwise lawful and honest, that such arrangements are not only to be treated as null and void, but are to have the effect of vesting tenancies, and rights of occupation, in

Appeal. 1893. MOONEY v. CHAMBERS.

people who have not got them, or of creating trusts which no one contemplated.

BARRY, L.J. :—

If the learned Revising Barrister means that the arrangement was not *bona fide*, simply because it was carried out in order to get votes for these two young men, his decision is quite wrong. I think that he had a deeper meaning. But unfortunately he does not express it. I have a strong suspicion that the real and sole occupier, not in a physical sense, but in the sense in which "occupier" is used in the Franchise Act, was the father. But, on the facts set out, I cannot dissent from the other members of the Court. On the case as stated it is impossible for us, on mere suspicion, to get over the legal result of a legal tenancy legally vested in the two young men.

Solicitor for the appellants: *Miller.*
Solicitor for the respondent: *O'Doherty.*

G. Y. D.

TORISH *v.* ORR AND SMITH (1).

Appeal.
1893.
Nov. 14, 15.

Parliamentary franchise—£5 rated freeholders—Local registration of Title Act (54 & 55 Vict. c. 66, s. 25)—Operation of conveyance, but not of a devise, postponed till registration—Costs of registry appeal partly successful.

O. was grantee of freehold lands of the qualifying value, to which the Local Registration of Title Act applied, under a conveyance executed before the commencement of the qualifying period. His title was not registered:—

Held, that the property in the land did not pass until registration under the Act, and that therefore O. was not entitled to the franchise as a £5 rated freeholder.

S. was devisee of freehold lands of the qualifying value, to which the Local Registration of Title Act applied, under the will of a testator who died before the commencement of the qualifying period. His title was not registered:—

Held, that the operation of a devise of lands, the title to which is registrable, is not postponed until registration, and that therefore S. was entitled to the franchise as a £5 rated freeholder.

The cases of the two claimants having been consolidated into one Registry Appeal, and the objector having been successful in his appeal as to one claimant, no costs were given to either party.

APPEAL by the objector against the decision of Mr. Cuming, one of the Revising Barristers for the North Tyrone Division declaring the respondent entitled to the franchise. The facts appear from the case stated, which was as follows:—

"At a Court held in said Division of said county by me, one of the Assistant Revising Barristers appointed to revise the list of voters of said Division and county, the names of said Robert Orr, Junior, and Andrew Smith, appeared on the register of voters for Castlederg polling district of said Division and county, and were duly objected to by said appellant.

The voters claimed as £5 rated freeholders.

The premises out of which they claimed respectively were each purchased under Lord Ashbourne's Act by other persons. One

(1) Before SIR PETER O'BRIEN, C.J., PALLES, C.B., and FITZ GIBBON and BARRY, L.JJ.

Appeal. 1893. TORISH v. ORR & SMITH

purchaser assigned his premises to Robert Orr; the other purchaser devised his premises to Andrew Smith. The deed was made, and the death took place subsequent to the date on which the Local Registration of Title Act came into operation, but before the commencement of the qualifying period.

It was objected that the titles were not registered under the recent Registry of Title Act, and that no interest passed until registration.

There was no proof given or offered that either set of premises was registered land within the meaning of said Act, except the admission of the respondents that the lands had been purchased under Lord Ashbourne's Act; and I held that these objections were bad, that the lands were not registered land within the meaning of said Act.

The claims were proved in all other respects.

If I was wrong in holding said objections bad, their names are to be removed from said list of claims, otherwise to be put on the list of voters for said District and Division as proved claims."

Healy and *M. J. Kenny*, for the appellant.

Ross, Q.C., for the respondents.

Cur adv. vult.

Nov. 15.

PALLES, C. B.:—

The question here is whether the freehold in these two parcels of land passed in the one case to Orr by the deed, and in the other case to Smith by the will.

The case of the deed is regulated by sect. 25, sub-sect. (1) of 54 & 55 Vict. c. 66. "A person shall not under any conveyance executed on or after the commencement of this Act acquire any estate in any such land until he is registered as owner of the land, but on being so registered his title shall relate back to the date of execution of the conveyance, and any dealings with the land before the registration shall have effect accordingly." Under this subsection it is plain that the property does not pass until registration, and it is admitted that there has been no registration in Orr's case. He is therefore not entitled to a vote in respect of

the property comprised in the deed, and his name must be struck off.

The case of the will is different. There is no enactment which postpones, by reason of non-registration, the operation of a devise of lands the title to which is registrable. Sub-section 1 of section 25 does not apply to a will. Its provisions are limited to a conveyance, as defined by the Conveyancing Act. Sub-section 2 of the same section prescribes the mode of registering the ownership of land when a change takes place in the title on the death of an owner. From its terms it is clear that it does not make registration a condition precedent to the property passing by the will. Therefore the decision of the Revising Barrister in Smith's case must stand.

In the result the appellant succeeds as to one vote, and the respondent as to the other. Under these circumstances neither party should have costs.

SIR PETER O'BRIEN, C.J., and FITZ GIBBON and BARRY, L.JJ., concurred.

Solicitors for the appellant: *Todd & O'Meara.*
Solicitor for the respondents: *Wilson.*

G. Y. D.

Ex. Div. 1893. Nov. 30.

THE LONDONDERRY PORT AND HARBOUR COMMISSIONERS (Complainants), Appellants; THE LONDONDERRY BRIDGE COMMISSIONERS (Defendants), Respondents.

Harbour Commissioners—Statutory powers of regulating conduct and hire of boats plying in harbour—By-law requiring boats to be licensed—Ultra vires *—Londonderry Port and Harbour Act*, 1854 (17 & 18 *Vict. c. clxxvii.*), *section* 26.

Harbour Commissioners were empowered by statute to make by-laws for regulating and fixing the conduct and hire or fare of all boats or ferry-boats plying in the harbour, and for regulating the conduct of boatmen, ferrymen, and others plying in the harbour:—

Held (*diss.* Murphy, J.), that a by-law, requiring the owners of boats carrying passengers within the port to take out an annual license from the Commissioners under a penalty was *ultra vires*.

Case stated by the Justices of Londonderry, pursuant to 20 & 21 Vict. c. 43, for the opinion of the Court.

At a Petty Sessions, holden in and for the Petty Sessions District of the City of Londonderry, on 11th September, 1893, the above-named defendants were charged by summons for that they "being the owners of a boat carrying passengers within the port of Londonderry, on the river Foyle, in the said city of Londonderry, did not, on the 1st January last, take out an annual license from the Londonderry Port and Harbour Commissioners, whereby the defendants became liable to a penalty not exceeding £5 for each omission, under the second by-law of the said Port and Harbour Commissioners," and the said charge having been duly heard, the Justices present ordered as follows:—"Dismissed by a majority of the Bench." The complainants having required the Justices to state a case for the opinion of the Court, the Justices stated as follows:—

At the hearing of the said complaint it was stated that the

prosecution was brought to test the liability of the defendants to take out annual licenses for their boats plying with passengers across the river at Londonderry, and the solicitor for the complainants (Mr. J. K. Reid) elected to take the case of a rowing-boat plying between the Middle Quay stage and St. Columb's stage. The following facts were admitted, namely, that the defendants were the owners of boats carrying passengers, and had not taken out a license; that the boats belonging to the Bridge Commissioners had never been licensed; and that they had never been asked to take out a license until just before the institution of these proceedings; and that they had always ferried independently of the Harbour Commissioners; and that defendants first began to ply between Middle Quay and St. Columb's stage in the year 1888, their landing-place at the Middle Quay being as near as possible to the old Ship Quay referred to in the lease to George Tomkins, hereinafter mentioned. The defendants, however, denied that they were owners of boats within the meaning of the by-laws.

On behalf of the complainants, Mr. Reid argued that the defendants should be convicted of a breach of the "By-Laws of the Londonderry Port and Harbour Commissioners for the regulation of the Port of Londonderry," inasmuch as they were using boats for ferrying passengers within the Port and Harbour of Londonderry, without having been licensed, as is required by the second by-law (1). He further contended that this second by-law applied to the boats of the defendants which were used in ferrying within the Port and Harbour, and that the complainants had full power to make a by-law regulating these boats of the defendants, the by-law having been made in pursuance of the provisions of the 26th section (2) of the Londonderry Port and Harbour Act, 1854,

(1) By-law 2. "That the owners of all boats carrying passengers within the port shall, on the first day of January in every year, take out an annual license from the Londonderry Port and Harbour Commissioners, under a penalty not exceeding £5 for each omission."

(2) 17 & 18 Vict. c. clxxvii. s. 26: "That, in addition to the by-laws which the Commissioners are authorized, under the 'Commissioners' Clauses Act, 1847,' and 'The Harbours, Docks, and Piers Clauses Act, 1847,' to make, it shall and may be lawful for the Commissioners, subject to the provisions of

Ex. Div. 1893.

L'DERRY HARBOUR COMMRS. v. L'DERRY BRIDGE COMMRS.

which gave the complainants power to make by-laws for regulating (*inter alia*) "the conduct and hire or fares of all boats or ferry-boats plying in the harbour, and the conduct of boatmen or ferrymen and others plying in the said port or harbour, lough or river." Mr. Reid also argued that the ferry-boats of the defendants are not exempted from the operation of a by-law made under this section by reason of the 100th section of the same Act, inasmuch as the ferries now carried on by them are not the ferry which once belonged to the Honourable Irish Society. In support of this contention he relied on the decided case of *The Londonderry Bridge Commissioners* v. *M'Keever* (1). Mr. Reid further argued that the boats of the defendants are not exempted from the operation of a by-law made under the 26th section of the Harbour Act, by reason of the 24th section of the defendants' own Act (40 & 41 Vict. c. cxcvi.) (2), this section only enabling the defendants to devote their funds to acquire and work ferries (an act on the defendants' part which formerly would have been *ultra vires*), and such ferries, when established, must be subject to all existing rights and powers of the complainants for the regulation of boats and ferry-boats within the harbour; and here again he relied on the case already quoted, *The Londonderry Bridge Commissioners* v. *M'Keever* (1).

On behalf of the defendants, Mr. W. L. Gilliland, solicitor, submitted :—

1. That the Bridge Commissioners were the grantees of the Irish Society of the right of ferrying over the Foyle, and as such had all the rights of the Society, and that the Society were the grantees of the Crown, and that by section 100 of the Port and Harbour Act of 1854, under which the Harbour Commissioners had power to make the by-laws in question, the rights and privi-

the said last-mentioned Act, from time to time to make and ordain such further rules, by-laws, and regulations . . . for regulating and fixing the conduct and hire or fare of all boats or ferry-boats plying in the said harbour, lough, or river . . . for regulating the conduct of boatmen, ferry-men, and others plying in the said port and harbour, lough, and river."

(1) 27 L. R. Ir. 86, 464.

(2) "It shall be lawful for the Bridge Commissioners . . . to acquire, maintain, let on lease, or otherwise to work steam or other ferries on the River Foyle at any place or places within the municipal limits of the

leges of the Society were preserved, and one of these privileges had been to ferry without a license; and that in any event, owing to the section, the by-laws did not affect or apply to the Bridge Commissioners. Mr. Gilliland put in evidence by consent a copy of a lease dated the 18th September, 1723, from the Corporation of Londonderry to George Tomkins, and also a grant dated the 23rd March, 1887, from the Irish Society to the Bridge Commissioners, and a deed of confirmation dated the 23rd July, 1887, from the Irish Society to the Bridge Commissioners (1).

2. That independently of the charter or grant from the Society the Bridge Commissioners were ferrying under the powers conferred upon them by their Act of 1877, and he referred to sect. 24 of that Act in particular and pointed out that that section was in contravention of the by-laws of the Port and Harbour Commissioners, as it restricted their charge to one penny while the by-laws of the Port and Harbour Commissioners would enable the Bridge Commissioners, if they were subject to them, to charge three pence, and he submitted that this Act made the Bridge Commissioners entirely independent of the Harbour Commissioners, and that if it did not, it at least showed that the by-laws did not apply to the Bridge Commissioners.

3. Also that no matter under what right the Bridge Commissioners were ferrying, the by-laws of the Harbour Commissioners did not apply to them, and were never intended to apply to them, and that the Bridge Commissioners were not "owners of boats carrying passengers" within the meaning of the second by-law. He referred to sect. 26 of the Londonderry Port and Harbour Act of 1854, under which the by-laws were made and which, he submitted, drew a distinction between "boats"

city of Londonderry which, to the said Commissioners, may seem good, and at any place or places outside such municipal limits to which the Irish Society shall, by writing under their seal, consent, and to demand and take tolls, rates, and charges, for or in respect of the use thereof, not exceeding one penny for every passenger, and for all animals, &c., not exceeding the several tolls authorized to be demanded and taken in respect of the use of the bridge, under the powers of the Act of 1859."—(Londonderry Bridge Act, 1859, 22 Vict. c. vii.)

(1) See 27 L. R. Ir. 93, 94.

Ex. Div. 1893.

L'DERRY HARBOUR COMMRS. v. L'DERRY BRIDGE COMMRS.

and "ferry-boats," and between "boatmen" and "ferrymen," and contended that the Harbour Commissioners had purposely restricted their by-laws to the boats and boatmen, and did not affect ferry-boats or ferrymen; and that as the Bridge Commissioners were the only ferrymen who had any right to ferry, they were the only ferrymen within the meaning of the Act, and that the others were boatmen merely, and that the by-laws therefore did not affect the Bridge Commissioners in any way, and that at the time the by-laws were made it was believed that the Bridge Commissioners had the exclusive right of ferrying, and that the fact that they had never until now been asked to take out a license showed that the by-laws had not been intended to apply to them. He pointed out, that under the 9th by-law a licensed boat must start if required by one passenger, and that if this were applied to the boats and steamers of the Bridge Commissioners it would ruin the ferry.

4. Also that the case of the *Londonderry Bridge Commissioners* v. *M'Keever* (1), upon which Mr. Reid relied, as showing that the Bridge Commissioners had no more right of ferrying than anyone else, was not evidence in the present proceedings, as to any question of fact, and submitted that if the right of the Bridge Commissioners, under the charter, were denied, a question of title was raised which ousted the magistrates' jurisdiction, and asked for a dismiss on that ground also.

Upon the said hearing seven of the Justices were of opinion that the defendants were not legally liable under the by-law, while three of them held the opposite view. Judgment was given against the complainants.

Campbell, Q.C., and *Osborne*, for the complainants :—

Complainants have power to make by-laws under provisions of section 26 of the Londonderry Port and Harbour Act, 1854, 17 & 18 Vict. c. clxxvii. The only effective way in which the conduct of "boatmen" and "ferrymen" can be controlled is by compelling each boatman or ferryman to take out a license. In any case, the by-law now in question has been sanctioned in

(1) 27 L. R. Ir. 84, 464.

the manner prescribed by the 85th section of the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), and is binding on all parties under the 89th section of the same Act, as the Harbours, Docks, and Piers Clauses Act is incorporated with the Londonderry Port and Harbour Act of 1854.

The defendants are in no better position than ordinary ferrymen or boatmen. They are not now carrying on the ferry that was granted to the Irish Society under their charter: *Londonderry Harbour Commissioners* v. *M'Keever* (1). The same case decides that the powers of ferrying conferred on defendants by the 40 & 41 Vict. c. cxcvi. do not confer on the defendants any right of ferrying inconsistent with the control of the complainants over the defendants' ferry-boats.

John F. Cooke, for the respondents:—

1. The by-law is *ultra vires*. Under the Harbour, Docks, and Piers Clauses Act, and the Londonderry Port and Harbour Act, 1854, the appellants have only power to make by-laws for regulating the conduct and traffic of all boatmen or ferrymen. This does not give power to license, which implies selection, and could be withheld at pleasure of the appellants from the respondents, defeating their power to ferry: *Dick* v. *Badart* (2); *Bentham* v. *Hoyle* (3).

2. *The Londonderry Bridge Commissioners* v. *M'Keever* (2) only decided that the plaintiffs there had no power to restrain others from ferrying, but they have a statutory, though not an exclusive, right to ferry: 40 & 41 Vict. c. cxcvi. s. 24; and are ferrymen, being so named in the Act. The by-law in question applies only to boatmen as distinct from ferrymen.

3. The magistrates' jurisdiction is ousted if this question of title is involved. Ferrymen are specially exempted from taking out a license under the Londonderry Port and Harbour Act, 1882, s. 34 (45 & 46 Vict. c. cxlii); and the respondents are ferrymen within this exception.

(1) 27 L. R. Ir. 84, 464. (2) 10 Q. B. Div. 387. (3) 3 Q. B. Div. 289.

Ex. Div. 1893.

L'DERRY HARBOUR COMMRS. *v.* L'DERRY BRIDGE COMMRS.

PALLES, C. B. :—

Of the four questions which have been submitted to us during the able argument at the bar, it is unnecessary that I should express any opinion upon more than one, viz. whether by-law No. 2 is or is not valid.

I am of opinion that it is not valid.

All persons were entitled at common law, and, unless prohibited by statute, still are entitled, to ply their boats upon and over the tidal navigable waters of the port, and to carry passengers in such boats. I cannot find upon the face of the special Acts any colour for suggesting that the Legislature intended to extinguish this right, or to give to the port authority the power of determining which only of several boats, or whose boats only, might lawfully ply for passengers within the port.

As well might it be held that, under the words at the commencement of the section, "for regulating the conduct of the masters, owner, and sailors of *all* vessels resorting to the port," they might impose a penalty on the owner of a vessel who resorted to the port without having previously obtained a license. The subject-matter within the power to make each by-law is as wide as possible. In the latter *all* vessels, in the former *all* boats. Thus, the Legislature contemplated as existing the right of *all* boats to ply, but *controlled* it by authorizing by-laws as to the *conduct* of such boats, and the boatmen, ferrymen, and others, actually engaged in plying them. I assume that we can read the word "conduct" as including the fitness of the boat for the purpose for which it was to be used, and the fitness of those engaged in plying it, whether boatmen, ferrymen, or others. And I am far from saying that reasonable by-laws prescribing that all boats shall answer any particular reasonable specification, or that boatmen, ferrymen, or others engaged in plying them, should be subject to penalties for unskilful or improper conduct as such, would not be valid. But notwithstanding all this, I think it follows from what I have already said that any by-law which imposes a penalty merely by reason of a boat plying with passengers, irrespectively of the conduct of such boat or of its fitness as a boat, or of the skill and ability of its boatmen, ferrymen, and others engaged in plying it, would

be unauthorized and bad. The by-law in question is of that character.

ANDREWS, J.:—

I am also of opinion that the determination of the Justices on the summons was right in point of law. The summons was founded on the second by-law made by the Harbour Commissioners, and purporting to be made under the provisions of the Commissioners' Clauses Act of 1847 and the Harbours, Docks, and Piers Act of 1847, and also of the authority conferred on the Harbour Commissioners by section 26 of their own special Act. This by-law, which is the second in the code, was made in 1858. [His Lordship read the by-law, *ante*, p. 385.] No doubt the object of such a by-law was a proper one. At the same time, I am of opinion that the power to regulate the conduct and the fare of these boats and the conduct of the ferrymen did not authorise the Harbour Commissioners to make a by-law in such general form. I cannot yield to the contention that it is impossible to provide regulations for the conduct of boatmen and of boats in any other way than by means of such a by-law. I think that it was both easy and possible to frame rules for such a purpose. In my opinion the by-law in question goes far beyond that necessity, and indeed it goes beyond the power given by the Act of Parliament, for which reason it was *ultra vires*. This by-law amounts to an assertion on the part of the Derry Harbour Commissioners of a right in them to exclude from the passenger traffic anyone that they pleased, and for any reasons. I have no doubt that such a right would be exercised by the Harbour Commissioners properly; but that is not the point in question. It is quite clear that under that by-law the complainants could refuse such license without giving any reasons for it. I desire to limit my judgment to the question of the validity of this by-law. The Harbour Commissioners have powers under the 68th sect. to give licenses to pilots; and that circumstance affords a strong ground for thinking that to enforce the licensing of passenger and ferry-boats, by means of a by-law, was not within the powers of the Harbour Commissioners, and that their so doing was *ultra vires*.

Ex. Div. 1893.

L'DERRY HARBOUR COMMRS. *v.* L'DERRY BRIDGE COMMRS.

MURPHY, J.:—

I shall very briefly state my opinion as to one point urged by Mr. Cooke in his excellent argument. He stated and argued that on four grounds the magistrates should not have convicted in this case. 1st, that their jurisdiction was ousted as a question of title was raised; 2nd, that the by-law under which conviction was sought was *ultra vires;* 3rd, that his clients were exempt from the operation of the by-law, even if lawfully made; and, 4th, he claimed exemption by virtue of sect. 24 of the Act of 1877. I think we are all agreed that as to three of the points made the respondents cannot avail themselves. If the by-law stands good against any person using a boat to carry passengers for hire from shore to shore or shore to ship, it will stand as against his clients, and jurisdiction was not ousted. The only difficulty in this case is whether the complainants had power to make the by-law which they seek to enforce against the respondents. In my opinion they had power to make the by-law No. 2. By sect. 26 of their Act of 1854, 17 & 18 Vict. c. lxxvii., power is given to them to make by-laws for several purposes connected with the harbour, lough, and river of Lough Foyle, and amongst them, "for regulating and fixing *the conduct* and hire or fare of all boats plying in the said harbour, lough, or river; and for regulating the conduct of boatmen, ferrymen, and others plying in the said port and harbour." Reading the entire section, it appears to me that such power was vested in complainants, as would enable them to regulate the entire traffic in the harbour and river or port. It is obvious that the traffic of carrying persons from one side of the river to the other required to be carefully regulated; and, if they proceed at all to regulate such traffic, it is essential that they should have power to see what class of persons seek to carry on such traffic. If every man, with any description of boat he chooses to take, is at liberty to carry on such traffic, the complainants have no power to carry out what, to my mind, is their clear power under the section. If power is given to "regulate the conduct of a boat," is it not essential that power should be given to fix and see who is the owner or worker of the boat? Is he a drunken fellow in charge of the boat, whose conduct may cause the loss of the lives of the

persons who hire him? The complainants, in my opinion, having a trust reposed in them to see that the traffic may be carried on with safety and fairness to the public, make by-law No. 2, the effect of which is that the owners of boats carrying passengers must, before they enter on a business in which the lives of passengers are to be entrusted to their charge, give the complainants the opportunity of knowing whether they are suited to carry on such business. If the complainants have no power to make this rule or by-law, I say they have no power "to regulate and fix the conduct of the boats," or "to regulate the conduct of the boatmen" who are to carry on this traffic. The business may be assumed by persons utterly unfit to carry it on, and the safety and comfort of the public who may be obliged to avail themselves of this means of transit will be utterly unprovided for. It is to be regretted that a case as important as this is cannot be taken to Court of Appeal. The only course open to complainants, if they think it important to retain their power of regulating the ferry traffic of the river, is by a new summons to get the opinion of the Queen's Bench Division, and if that is unfavourable, to seek for an Act to vest in them powers to enable them to enforce the rule pointed at by by-law No. 2, which, in my opinion, they have now power to make; and I am also of opinion that it is essential for the good order of the port, and the public benefit, they should have.

The following is the curial part of the order:—

> "THE COURT, being of opinion that the determination of the said Justices in dismissing the summons was correct in point of law, and being also of opinion that the said summons should have been dismissed, on the ground that the By-law No. 2 was *ultra vires* and void, doth hereby affirm the decision of the said Justices; and doth order that the said appellants do pay to the said respondents their costs of the said case and of this argument, when taxed and ascertained by the proper officer."

Solicitor for the appellants: *J. K. Reid.*
Solicitor for the respondents: *W. L. Gilliland.*

J. P. B.

Appeal. 1893.

June 5, 6, 7, 8, 9.

THE QUEEN (AT THE PROSECUTION OF LORD ROSSMORE) *v.* THE IRISH LAND COMMISSION (1).

Mandamus—*Land Law (Ireland) Act*, 1881, *s.* 48—*Refusal of Land Commission to state case for Court of Appeal—Question of law—Application to state case for appeal, whether frivolous and vexatious.*

In 1878 D. had taken from R. a holding, containing 14A. 0R. 2P., under an agreement for the season, which stated the lands to be part of the townparks of M., at the rent of £56, and which contained an agreement not to sublet. In 1880 a second written agreement, identical in terms, was executed between the parties, for the season ending the 1st November, 1880. Since 1880 D. had remained in occupation, at the rent of £56; but no further agreement was executed. In October, 1887, the tenant served an originating notice to fix a fair rent, and the Sub-Commission fixed a fair rent at £30. The landlord appealed, stating in his notice of appeal two grounds—first, that the holding was a townpark, and, secondly, that the letting was one for temporary convenience. When the case came on for hearing before the Land Commission at Monaghan counsel for the tenant was stating his case, when Bewley, J., intimated that the Land Commission had seen the premises, and that the *onus* lay upon the landlord of showing that the case was not within the Act. Counsel for the landlord then proceeded to state his case, and gave evidence for the purpose of showing that the holding was a townpark. The hearing of the case took up the rest of the day, when the Court reserved judgment until the following morning. On the next day Bewley, J., commenced to deliver judgment, when a second counsel for the landlord, who had not been present on the former day, asked leave to intervene. Bewley, J., refused leave until after the judgment was delivered. Judgment was then given, affirming the order of the Sub-Commission, and counsel for the landlord asked leave to appeal, stating that there was a question of law he was anxious to raise. Bewley, J., refused leave to appeal, but said he would state a case for the Court of Appeal on any questions of law that might be sent in to them. A draft case was then prepared, raising three questions—(1) whether the holding was a townpark, as defined by the Land Law Act, 1881; (2) whether the tenant was a present tenant, as defined by the said Act; and (3) whether the holding was excluded from the said Act, as not being agricultural or pastoral in its character, but let to the tenant for his temporary convenience, and as an adjunct to his residence; and, on the 5th December, it came on to be settled

(1) Before PALLES, C.B., and FITZGIBBON and BARRY, L.JJ.

before the Land Commission, and after hearing counsel on both sides, Bewley, J., refused to state a case, on the ground that the questions were questions of fact, or mixed questions of fact and law. That order was subsequently amended by another member of the Land Commission joining in the order, and giving, as a further ground for refusing the application, that it was frivolous and vexatious. The landlord having applied to the Queen's Bench for a *mandamus* to the Land Commission, directing them to give liberty to appeal, or to state a case for the opinion of the Court of Appeal, that Court refused the order:—

Held (reversing the decision of the Queen's Bench, Barry, L.J., *dissentiente*), that a *mandamus* should issue to the Land Commission to hear and determine an application on the part of R. for leave to appeal or to have a case stated.

THE lands in this case were originally held under an agreement, dated the 1st November, 1824, from the Dowager Lady Rossmore to Robert Little, for three lives, or nineteen years, at the rent of £21 2*s.* 7*d.* The last survivor of the *cestui que vies* died in 1877, Dr. Donnelly, the Roman Catholic Bishop of Clogher, being in possession. An agreement was then executed between Lord Rossmore and Dr. Donnelly in the following form:—

AGREEMENT FOR THE LETTING OF A TOWN PARK.

I, James Donnelly, do hereby agree to take from Lord Rossmore for the season ending 1st November, 1878, the use and enjoyment of parts of the lands of Aughanimy and Lathorcan, situate in the parish and barony of Monaghan, which said lands form part of the town parks of Monaghan, and contain, by estimation, in Aughanimy 3A. 1R. 3P., and in Lathorcan 10A. 2R. 39P., making together 14A. 0R. 2P., statute measure, or thereabouts, at the price or sum of £56 sterling, on the following terms and conditions, viz.:—

First, I agree to keep the gates, stiles, hedges, and fences in good repair and order, and the ditches, drains, and outfalls open and clear to carry off the water.

Secondly, I will mow or destroy all the docks, thistles, and weeds once, at least, during my occupancy, and especially during the month of August next.

Thirdly, I will not assign, sub-let, or part with the possession of the said premises, or any part thereof, without the consent, in writing, of the landlord, or his agent for the time being.

Fourthly, I will not, without such consent as aforesaid, break up any portion of said lands which is now in grass, nor will I alter the fences of said lands in any way.

Fifthly, should any of the foregoing terms or conditions be violated, then, and in such case, I do pay the sum of £10 as an additional rent or fine.

Appeal. 1893.

THE QUEEN v. IRISH LAND COMMISSION.

Sixthly, the landlord to pay half the poor-rates, and all county cess, and all other taxes and rates which may be laid on said premises.

Dated this 25th day of March, 1878.

The tenant remained in occupation of the lands during the year 1878 and 1879, and on the 13th May, 1880, executed a second agreement, identical in its terms with that of 1878, for the season ending 1st November, 1880.

From 1880, until the service of the notice to fix a fair rent in October, 1887, and since, the tenant had remained in possession of the said lands without any further agreement either in writing or by parol, paying the rent of £56 each year, being the rent specified in the said agreements of 1878 and 1880. The tenant in 1878 was and since had been living in a house close to the said lands and adjoining the cathedral of Monaghan. It was stated that the rent of £56 was far in excess of the agricultural rent of the said lands, and the tenant was induced to give this large rent by reason of the accommodation that the lands afforded to him by securing to him the amenity and privacy of his residence, and also by the fact that they ran into the lands adjoining his residence, coming up to within 15 perches of his house, and he was thereby enabled to farm them as one lot. Since 1878 the tenant had used the lands in the ordinary farming way, both as to their cultivation and the sale of the produce. There was no residence on the lands. The tenant, Dr. Donnelly, from 1864, resided in a house with 10A. 2R. 23P. attached thereto, which he held as tenant from year to year to Lord Rossmore. This house was nearly opposite the new Roman Catholic cathedral and within 300 and 400 yards of the township boundary of Monaghan, and between it and the town the greater portion of the lands, the subject-matter of the originating notice, lay.

The Sub-Commission decided in favour of the tenant, and fixed the fair rent at £30, the landlord's contention being that it was a townpark. The landlord having appealed, the case appeared before the Land Commission Court in Monaghan, in January, 1891, but was not reached. It appeared again in a sitting of the Land Commission in Monaghan, on the 1st November, 1892. There was a very long list of appeals before the Land Commission,

and Bewley, J., stated at the commencement of the sitting that in the event of adjourned cases not being reached before Thursday they would then be taken, and subject thereto all cases would be taken in their regular order.

A brief had been given by the solicitor for the landlord to Mr. Law, Q.C., to attend in Monaghan, and on the announcement being made, he telegraphed to Mr. Law, to attend on Thursday morning. But the intervening cases were disposed of so rapidly that on Wednesday evening this particular case was reached, and as the Court refused leave for an adjournment, the landlord's solicitor instructed another counsel to appear for him. When the case was called, Bewley, J., announced that he and his colleagues had inspected the place, and they were satisfied and would so decide that the residence of the tenant was not within the town of Monaghan or its suburbs, and that therefore the contention as to a town-park must fail. Mr. Gordon, Q.C., was then called on by the Court to state the case for the landlord. He contended that the holding was a town-park, but did not raise any question of tenure, or argue that it was a letting for temporary convenience. Evidence was then given, the tenant was examined by his counsel, and the judgment was reserved. On the following morning, Bewley, J., had just commenced to deliver judgment when Mr. Law, Q.C., asked permission to state a point of law, but the Judge declined to hear him until judgment was concluded. On the conclusion of the judgment, Mr. Law stated the two points he was anxious to raise, but the Court said it was too late to raise them. Counsel for the landlord then asked for leave to appeal, but Bewley, J., refused, stating that he would state a case for the Court of Appeal on any questions of law that might be sent into them. Mr. Law then stated that there was one other point which he would ask the Court to reserve—a point of law. Mr. Teeling, the counsel for the tenant, asked what the question was, and Mr. Law stated that he was quite ready to mention it, but that they would send it in in the case stated. Bewley, J., said that the landlord might raise any question of law that appeared on the evidence, but that what that question was he did not see.

A draft case was then prepared, and a copy served on the tenant's solicitor, and on the 2nd December, 1892, notice was

Appeal. 1893.

THE QUEEN v. IRISH LAND COMMISSION.

received from the Land Commission, stating that Monday the 5th December had been fixed by the Court to settle the case. The draft case, as stated, after setting forth the facts, proposed to ask three questions—1, whether the holding was a town-park, as defined by the Land Law Act, 1881; 2, whether the tenant was a present tenant, as defined by the said Act; 3, whether the holding was excluded from the said Act as not being agricultural or pastoral in its character, but let to the tenant for his temporary convenience and as an adjunct to his residence.

On the 5th December, Bewley, J., after hearing counsel on both sides stated that the questions proposed to be stated were mixed questions of fact and law and refused the application to state a case. On the 11th January, 1893, counsel for Lord Rossmore appeared before Bewley, J., and called his attention to the fact that the order purported to be made by a single Judge, and did not disclose any grounds for the refusal. On the following day Bewley, J., announced that the order would be made up as a Court order, that Mr. Commissioner FitzGerald, concurred in it, and that they would add, as a ground for refusing the application, that it was frivolous and vexatious. Accordingly the order of the 5th December was amended by refusing the application, on the ground that the questions sought to be submitted were questions of fact, or questions of mixed law and fact, and further, that the application was frivolous and vexatious.

On the 1st February, 1893, Lord Rossmore obtained from the Queen's Bench Division, a conditional order for a *mandamus* to the Land Commission to state a case for the opinion of the Court of Appeal, and moved to make the conditional order absolute. On the 9th May, 1893, the Queen's Bench Division (O'Brien, Johnson, Holmes, and Gibson, JJ.) gave judgment, discharging the conditional order (1). From that order Lord Rossmore appealed.

(1) The following is the judgment of the Queen's Bench Division.

O'BRIEN, J.:—

The members of the Court do not consider that they would derive any advantage from taking further time to consider the judgment which we have to pronounce. It is a matter, no doubt, of very great importance, but one upon which it is not necessary to express any opinion, save so far as is required for the purpose of a decision upon the application before us, which is one for a

Campbell, Q.C. (with him *Gordon, Q.C.*, and *H. W. Jackson*), for the appellant:—

There are questions of law in this case to be decided which are open to the landlord to raise. First—What was the position of Dr. Donnelly in August, 1881? On the 30th May, 1880, he had an agistment letting for the season, and in August, 1881, he was an over-holding occupier under an agistment letting. That is a question of law—namely, a question of tenure. Another question is—Whether there was an agreement that he would take and hold the land as a town park? The first question of law would be—"Whether there being no villa residence between the tenant's residence and the town boundary, the holding being between them, was a holding within the suburbs?" The Land Commission inspected the premises—that is a course which was disapproved of by Lord Westbury in *Jackson* v. *The Duke of Newcastle* (1). If Bewley, J., decided on what he saw and not on the evidence given in Court, how can this Court decide when they cannot see the premises? Here what the Land Commission did was, without waiting to see whether the relation of landlord and tenant existed, they went out and saw the place, and then decided it was a question of fact. It was never contemplated by the Legislature that the Land Commission should go and view the premises: section 48, sub-section 4; they may require a report. Section 48, sub-section 2, is mandatory on the Land Commission; they must state a case unless they judicially decide that the application to do so is frivolous and vexatious. An inferior Court cannot refuse to state a case, on the ground that an objection has not been brought to its notice, where the objection goes to the root of the matter: *Ex parte Markham* (2). Then there was a question of law as to whether the tenant was not estopped from denying that this was a town-park. Again, there was the question of law,

writ of *mandamus*, directed to the Irish Land Commission, to compel them to allow the present applicant to appeal from an order made by them in a case in which Lord Rossmore was landlord and the Catholic Bishop of Monaghan was tenant, or to compel them to state a case for the Court of Appeal.

In reference to the part of the motion which is conversant with the appeal, I believe that, from a very early period of the argument, no difficulty was

(1) 3 De G. J. & S. 275, 286. (2) 21 L. T. (N. S.) 748.

Appeal. 1893.

THE QUEEN v. IRISH LAND COMMISSION.

whether this was a present tenancy subsisting on the 22nd August, 1881. Lastly, there was the question whether this was a letting for temporary convenience.

Even if the inferior Court has a discretion, the Court above will make an order against them if it thinks they exercised such discretion wrongly: *Reg.* v. *Boteler* (1); *Reg.* v. *Adamson* (2); *Reg.* v. *Bishop of London* (3), where the decision below was reversed. The Land Commission decided that there was no question of law, and the moment they did that they cut away the ground of their decision that the suggested question of law was frivolous and vexatious.

White, Q.C., Meredith, Q.C., and *M'Carthy Mahony*, for the Land Commission:—

There were two questions raised before the Land Commission—1, Was the holding a town park? and 2, Was there such a special contract as excluded it from the Act of 1881? The question of tenure was never raised at all.

entertained by any member of the Court as to the impossibility of acceding to the application, it being absolutely certain, upon the terms of the statute itself, that, as the condition of any appeal, there must be the concurrence of the tribunal against which the order is sought.

In reference to the other branch of the motion, the application for a *mandamus* to state a case, a greater amount of difficulty has arisen. However, as the result of conference and consideration during the arguments, the members of the Court are, I believe, not less decisively of opinion that there is no question of law in this case which could be stated; and, whatever effect belongs in law to the statement of the Land Commission that the application was frivolous and vexatious, whether or not that is a judgment which they alone can form, the authority to state a case is peremptorily circumscribed within the boundary that it must be concerning a matter of law.

There are, no doubt, questions of law which might be raised in an appeal upon the evidence, but not such as in their view would be distinct from questions of fact; and this Court, therefore, cannot remove from the Land Commission the determination of the facts as they exist, or require them to state evidence, always subject to be varied by other evidence, when it is the judgment upon that evidence, finally ascertaining the fact, that is the province assigned to them by the law. Outside of the Act of Parliament and decided cases, none of which reach the language of the present statute, the nature of the subject-matter, or the right of appeal, it is perfectly plain that there may be great reason in public policy for the act of the Legislature in confining, even to the

(1) 4 B. & S. 959.
(2) 1 Q. B. D. 201.
(3) 23 Q. B. D. 414; on appeal—24 Q. B. D. 213.

Judges frequently visit premises, the subject-matter of litigation. It was done in *Flynn* v. *Dollard* (1) and *Verner* v. *Cochrane* (2). If the Land Commission gave a decision on a matter within their jurisdiction their decision cannot be challenged: *Ex parte Johnston* (3). There is no jurisdiction to grant a *mandamus* to a Court of inferior jurisdiction unless the Court has declined jurisdiction or exceeded its jurisdiction. The bishop was an annual tenant, paying an annual rent, and that was never disputed till they came to the Queen's Bench. We submit that the Court will not grant a writ of prohibition or *mandamus* for a question that was never raised in the Court below. The question to be decided was within the jurisdiction of the Land Commission under section 48, who are to decide all questions of law and fact. The proper course for the landlord to adopt was to ask for a rehearing. The Court will not grant a *mandamus* to state a case if it will lead to nothing: *Reg.* v. *Justices of Pembrokeshire* (4);

fallible reason of a tribunal, or individual, with all the risks of error, the final decision in matters of this kind, upon consideration of the great multitude of cases that would arise, the condition of the class of persons interested in them, the necessity for immediate adjustment of a relation of such vast extent, with renewing obligations of such great importance to the whole country attending it, and other inconveniences that could not but result if there were not a tribunal in which the right of judgment was ultimately and finally placed without any further reservation or uncertainty whatever.

No doubt the different members of the Court may be led by other reasons and arguments to the conclusion at which we have arrived, besides those in which we all alike concur, and I do not wish therefore to anticipate the separate views that they may desire to express; but I believe that all the members of the Court are clearly of opinion that it is impossible for them, on the grounds that have been stated, to interfere with the discretion of the Land Commission.

As to costs, we all consider that there should be no costs; for it is quite plain that it was the course of procedure adopted that led to this question being raised; and, as to the tenant's costs, there ought to be no distinction in respect to them, for the affidavit was filed after it was known that the burden of showing cause was undertaken by the Land Commission.

The cause shown will be allowed, and the order for a *mandamus* discharged.

JOHNSON, HOLMES, and GIBSON, JJ., concurred. A. E. B. J.

(1) Not reported. M. R., Ir. The action was for an injunction to restrain interference with ancient lights, and turned solely on questions of fact.

(2) Not reported. Appeal, Ir., 1st July, '90—a question of boundaries.

(3) 14 L. R. Ir. 80.

(4) 2 B. & Ad. 391.

Appeal. 1893. THE QUEEN v. IRISH LAND COMMISSION.

Rex. v. *Justices of Suffolk* (1); *Allcroft* v. *Bishop of London* (2); *Stracy* v. *Blake* (3); *Doe* v. *Roe* (4).

Roche, Q.C., and *Teeling*, for the tenant.

Campbell, Q.C., in reply:—

There must be enough on the face of the order of a Court of inferior jurisdiction to show their jurisdiction: *Reg.* v. *Sykes* (5); *Ex parte Smith* (6); *Reg.* v. *Justices of Antrim* (7). We submit that this question arose in the course of the proceedings; but points of law not raised before an inferior Court may be considered by the Court on a case stated: *Kavanagh* v. *Glorney* (8); *Guardians of Enniskillen Union* v. *Hilliard* (9); *Mathews* v. *Carpenter* (10); *Knight* v. *Halliwell* (11).

June 9.

PALLES, C. B.:—

This is an appeal from an order of the Queen's Bench Division discharging a conditional order for a *mandamus* to the Irish Land Commission.

The order appealed from being interlocutory, our decision, if we affirm the order, will be final. Upon the other hand, an order of this Court directing the *mandamus* to issue will not absolutely decide any of the questions involved. Such an order will do no more than put the matter in a train for ultimate decision, so that the opinion of the House of Lords can be taken upon it. In this respect such an appeal differs from an appeal from an interlocutory order in England; and I retain the opinion I expressed in *The Queen* v. *Runciman* (12), that so long as the decision of this Court on motions is final, we ought not to depart from the practice which was settled both in England and Ireland before the Judicature Act, that where, upon an application for a writ of *mandamus* or

(1) 1 B. & Al. 640.
(2) [1891] App. Cas. 666, 675.
(3) 1 M. & W. 168.
(4) 1 E. & B. 279.
(5) 1 Q. B. D. 52.
(6) 3 Q. B. D. 374
(7) 4 L. R. Ir. 230.
(8) Ir. R. 10 C. L. 210.
(9) 14 L. R. Ir. 214, 220.
(10) 16 L. R. Ir. 420.
(11) L. R. 9 Q. B. 412.
(12) 28 L. R. Ir. 550.

quo warranto, a serious question of law arose, the writ should go, to enable the parties to raise the question on the record.

I accordingly approach the consideration of the questions which have been argued, not for the purpose of definitely determining them upon this motion, but to see whether they are of such a character, and raise considerations of law of such difficulty, as entitle the prosecutor to carry the case, if so advised, to the ultimate tribunal.

The form of the conditional order is that the Land Commission should give liberty to appeal, or, in the alternative, that they should be ordered to state a case for the opinion of the Court upon certain questions. Such an order, if made absolute in its terms, would deprive the Land Commission of the exercise of any judicial discretion, and would thus exclude from their consideration questions, the determination of which the Legislature has deputed to them. Such an order cannot be made absolute in the terms in which it is framed. If the discretion of the Commission (as has been contended), has not been exercised, the writ should, in form, command them to judicially consider and determine the application, and should not, as does the present conditional order, dictate to them the judgment they should pronounce. This is, however, a difficulty of mere form, and is not insuperable. We are not absolutely bound by the form of the conditional order; and if we find that substantial justice requires that there shall be a consideration and determination by the Land Commission of matters which it has not yet considered and determined, according to its duty under the statute, we are, in my opinion, at liberty, notwithstanding the form of the conditional order, to frame our absolute order in such terms as will do justice. The case does not differ in substance from that of an appeal from an order made upon an ordinary motion, on notice, in which the relief sought by the notice is not precisely that to which the applicant is entitled. In such cases the Court constantly grants the relief which it deems appropriate, although it may not be identical with that asked by the notice. From an early part of Mr. Campbell's argument I understood his contention to be that he was entitled, not to have the conditional order made absolute in its terms, but to a *mandamus* to the Land Commission to hear and determine

Appeal. 1893. THE QUEEN v. IRISH LAND COMMISSION. Palles, C.B.

Lord Rossmore's application either for liberty to appeal, or, in the alternative, that they should state a case upon the question No. 2 in the draft case, slightly modified, so as to make it apparent that the question is one of law purely.

I am of opinion that an order for such a *mandamus* ought to be made.

The order of the Sub-Commission fixing a fair rent involved (or at least ought to have involved) a judicial decision by them that the holding was one within the Land Law Act of 1881. The notice of re-hearing was in the form directed by Rule 1 of the 16th January, 1890, and stated two, but only two, grounds of appeal: first, that the holding was a town park; secondly, that the letting was one for temporary convenience. The rule requiring the grounds upon which it is sought to reverse the decision of the Sub-Commission to be stated in the notice probably tends much to expedite and simplify the business before the Commission; but I am myself clearly of opinion, and I have reason to know that at least one of the legal members of the Commission entertains the same view, that that rule would not justify them in excluding from consideration, upon a re-hearing, matters which were not mentioned in the notice. Were such the construction of the rule, it would be clearly contrary to the statute, and void. I make this the basis of my judgment. When the case was called on before the Land Commissioners, they appear, upon the evidence, to have intimated to the landlord's counsel that the *onus* lay upon him of proving that the holding was not within the Act; and they appear to have done that before they had received any evidence for the tenant. This, I think, plainly appears, not only from the affidavits, but also from that which I prefer to rest upon, the judgment of Mr. Justice Bewley, which in two separate passages refers to the *onus* lying upon the landlord. I feel bound to say I am unable to concur in any construction of the statute which would authorize such a ruling. No doubt, section 57 enacts that "every tenancy to which this Act applies shall be deemed to be a present tenancy until the contrary is proved;" and in *Ex parte Johnston* (1) the Court of Exchequer gave effect to that enactment, by holding, in a

(1) 14 L. R. Ir. 80.

case in which there was a tenancy to which the Act applied, but which upon the evidence in an application for a prohibition was shown not to be a present tenancy, that as by the Act the *onus* was thrown upon the landlord to disprove that such a tenancy was not a present one, the case was one within the jurisdiction of the Land Commission, and therefore was not one for prohibition. But the basis of that judgment was that the tenancy was one to which the Act applied. Upon the other hand, in *Westropp* v. *Elligott* (1) the question whether the tenancy was one to which the Act applied was discussed and decided in the House of Lords, in an ejectment which was brought after the fair rent of the holding had been fixed by the Commission. In the House of Lords, there was no suggestion that a decision by the Land Commission, in respect of a tenancy to which the Act did not apply, could be within their jurisdiction. Had it been so, the decision of the Land Commission would have been conclusive, and the question determined by the House of Lords could not have been litigated before it. This conclusively distinguishes the question here from that decided in *Ex parte Johnston* (2). The judgment there cannot apply to a case in which the contention is that the tenancy is one to which the Act does not apply. Before the *onus* can be thrown upon the landlord, under section 57, it is necessary to determine that the tenancy is one to which the Act applies; and in the present case the Commission could not have held the tenancy to have fulfilled that condition unless they held—1, that the holding was not a town park, and 2, that the letting was not one for temporary convenience, that is, the *onus* could not have been thrown upon the landlord, until the learned Commissioners had first ruled against him both the questions stated in the notice of re-hearing.

That ruling, however, having been made, the landlord's counsel yielded to it, and proceeded with his evidence; but there appears to be ground for tracing to the initial error in this early ruling everything now complained of by the prosecutor. The effect of the evidence given before the Commission was that any tenancy that existed in the holding had its origin in two written agreements between the tenant and the late Lord Rossmore. The

(1) 9 App. Cas. 815. (2) 14 L. R. Ir. 80.

Appeal. 1893.

THE QUEEN *v.* IRISH LAND COMMISSION.

Palles, C.B.

first of these was for the season ending 1st November, 1878. There was an overholding after that date upon the terms of the agreement; and on 2nd May, 1880, a second agreement was entered into, which was identical in its terms with the first, save that it was for the season ending 1st November, 1880. It appears to have been conceded that from 1880 to the time of the re-hearing, the tenant remained in possession of the land. It did not appear that there had been any further express agreement, either in writing or by parol, but it was proved that the tenant had continued to pay, as rent, the yearly sum of £56, which was the sum mentioned in each agreement as the amount to be paid for the occupation for the season.

I am satisfied that these agreements created the relation of landlord and tenant for the respective seasons mentioned in them, and that they were not mere licenses to use and crop the land, while the possession remained in the landlord. Although the matter may be left doubtful in the commencement of the agreements, the third clause of each contains a covenant that the tenant will not assign, sublet, or part with the *possession* of the premises without the consent therein mentioned. This shows that the occupation under the agreement was what, in law, is strictly the possession of the land, and not a use under a mere license. The rest of the evidence pointed to the locality of the residence of the tenant. To this it is unnecessary to refer.

The matters which the Land Commission appear to have judicially considered upon the re-hearing were two: first, whether the holding was a town park. This turned upon whether the residence of the tenant was within the suburbs of Monaghan, which is a question of pure fact. Secondly, whether by reason of some estoppel or contract, the tenant was precluded from alleging that the residence was outside the suburbs. The Commission did not consider the further question, which was one of those upon which their jurisdiction depended, viz., whether, if the holding were not a town park, it was one to which the Act applied, or in other words, was a present tenancy. I cannot help thinking that had the case been permitted to proceed in the ordinary way, instead of the *onus* of proof having been thrown upon the landlord, it would have been impossible that this question could have escaped notice.

As a matter of fact, however, it did not occur to anyone upon the first day of the re-hearing. The landlord's counsel did not rely upon it, nor did the Land Commissioners themselves advert to it; and in the result the matter now relied upon, matter which went to the jurisdiction of the Commission, was not only undetermined, but unconsidered. It was not that there was an erroneous decision of the question: there was no decision of it whatsoever. It was not considered, because it was not present to their minds. It was not present to their minds, because the consideration of the case had been approached from a wrong standpoint. Of the various considerations involved in the question so overlooked I shall mention but one. To entitle the tenant to have a fair rent fixed, the tenancy must have been in existence on the 22nd August, 1881, the day of the passing of the Act, and must have been a tenancy from year to year. The possession to the 1st November, 1880, was admittedly under the written agreement, and was only for the season ending on that day. There was a subsequent overholding for nine months and twenty-two days prior to the 22nd August, 1881. For this overholding no sum had, prior to that day, been actually paid. There was no express agreement for a tenancy from year to year. The tenant had previously held over, without a new agreement, for a longer period after the termination of the agreement of 1878, and both parties had treated that first overholding as being, not under an implied tenancy from year to year, but under an agreement for an additional season. What was the proper inference of fact to be drawn from those circumstances? Was it that the second holding over, viz. that after the 1st November, 1880, was for an additional season only, in which case there would not have been a "present tenancy," or was that second holding over under an implied agreement for a tenancy from year to year? I express no opinion how that question ought to be decided. All I determine is, that it was one which ought to have been considered by the Land Commission, and that until they had decided it they had not jurisdiction to affirm the order of the Sub-Commission. I fully feel the inconvenience of the question not having been raised by the landlord's counsel; but, as the matter was one which went to jurisdiction, I feel coerced to hold that

Appeal. 1893.

THE QUEEN v. IRISH LAND COMMISSION.

Palles, C.B.

there was a duty upon the Commission to consider it, even though not raised by counsel.

What I have already said is in reference to the occurrences of the day of the argument. Upon the next day the learned Commissioners decided both the questions, which I have already indicated as those which alone were considered by them; and their decision upon those questions appears to me to be in all respects correct. The first was a matter of fact, and it was decided upon the evidence, read by the light of the Commissioners' inspection of the premises. It is said that they had no authority to inspect. I am satisfied that they had. Mere inspection would not be evidence upon which, alone, they could act; but I am of opinion that, without any special power being given to it by statute, a judicial tribunal has authority, if it has actual knowledge of the local situation of premises, to read evidence given on oath before it by the light of its local knowledge, and thus apply it to the case before it. The cases cited during the argument are not as to the existence of this authority, but as to the prudence of exercising it in certain cases.

As to the second question, the Commissioners decided, and I agree with them, that there was nothing in the documents of 1878 and 1880 which precluded the tenant from denying that the holding was a town park.

Now comes a matter as to which I desire to be very explicit, because, but for it, it would be impossible to entertain the case. If nothing had been said immediately after that opinion of the Commissioners had been announced, and if the Commissioners had once definitively and without reservation, affirmed the order of the Sub-Commissioners, the case would have been wholly different from the present. They did not, however, do that. Immediately upon the opinion of the Land Commission being stated, Mr. Law, one of the counsel for the landlord, who had not been in Court on the previous day, applied for liberty to appeal; and the learned Commissioners, without considering or deciding any question other than those I have already mentioned, refused such liberty, stating as their reason that the locality of the residence of the tenant was one which, in consequence of their view, they had a better opportunity of deciding than this Court of Appeal could have. Had

they really considered and decided the entire case, they would, in so ruling, have been entirely within their jurisdiction. The judgment, however, from which they thus refused liberty to appeal, was given at a time up to which, it is plain, that a substantial question, which ought to have been, but was not, in fact, determined, was not within the view of the Court at all; and this judgment was accompanied by something more. The Commissioners said that they would be willing, if upon further consideration it seemed to them that a question of law arose, to state a case for this Court for the determination of that question. I hold that that reservation prevented their opinion as previously delivered operating as a complete judgment, and that in law the application to fix a fair rent was still *sub judice.*

Had, however, the matter rested there, it might be suggested that the deferred consideration was limited to the questions of law which had been raised upon the previous day by Mr. Gordon, and therefore did not include that as to the tenancy being a present one. That question, however, does not arise here, because Mr. Law again intervened, and said that there was an *additional* question of law which Mr. Gordon and he wished to bring before them, and the Commissioners assented to Mr. Law deferring his statement of the nature of the additional question until the draft of the case should be furnished in Dublin. In my opinion, the effect of what took place was that the Commissioners decided to reserve for consideration in Dublin whether there was, upon the face of the proceedings, any question of law, whether it had been brought before them or not, which was fit to be reserved for the consideration of the Court. That reservation not only negatives a refusal to state a case (which is admitted), but negatives also the finality of the ruling of the Land Commission upon the re-hearing. It further left open for consideration whether the Land Commissioners had before them that full view of the case in all its aspects, and that knowledge of all the questions alleged to arise in it, which was necessary to enable them to exercise their judicial discretion as to allowing or refusing an appeal. A further effect of this course of procedure is that every question stated in the draft case subsequently submitted is to be treated as if it had been put forward upon the moment after the opinion of the Land Com-

Appeal.
1893.

THE QUEEN
v.
IRISH LAND COMMISSION.

Palles, C.B.

mission had been announced. I do not pause to consider whether it was at the request of the Land Commission, or merely by its permission, that Mr. Law did not state the questions at once. It is not germane to the present appeal to inquire whether the motive was or was not a wish of the Land Commission not to have the trial of other cases delayed. However this may be, it is clear that Mr. Law was told that it would be sufficient for him to state his point in Dublin, and that he could then state it by sending in a draft case. Accordingly the draft case is sent in; and some of the difficulty upon this appeal has arisen from its form. The first question proposed to be submitted by it was, whether the holding was a town park, as defined by the Act of 1881. That was a question of fact, and ought not to have been introduced. But then question 2 is, "whether the tenant was a present tenant, as defined by the said Act?" That question might be either a mixed question of law and fact, or a question of law only, according to the statements in the previous part of the case. If, for instance, there were an express statement in the case (of that which I believe to be implied in every such case, unless the contrary is stated), viz. that every inference of fact in favour of the decision of the Commissioners, which they might legitimately have drawn, was to be deemed to have been drawn by them, the question would have been one of law. In the case as drawn there was no statement to the contrary. Further, it was intended to be presented as a question of law, under a jurisdiction to state questions of law only, and a liberty given to the landlord to prepare a case stating questions of law only. But whether, taking the case as a whole, the question was in all strictness one of law, it is unnecessary to determine, for even were it not, it is certain that it involved one, and an important one, viz. whether the Commissioners, upon the evidence, were justified in point of law of drawing the inference of fact that a tenancy from year to year existed on the 22nd August, 1881.

Now, the Land Commission decided that all the questions stated in the case, including that which I have mentioned, were mixed questions of law and fact, and then they proceeded to decide that in their opinion the application to state those questions was frivolous and vexatious. The first ground of that decision excludes the possi-

bility of the existence of a subject-matter for the existence of the judicial discretion involved in the second ground. The application to them must be to state a question of law, and they must then consider whether the application to state a case *on that question of law* is frivolous and vexatious. The moment, therefore, they decide the question to be one of mixed law and fact, they have no power or jurisdiction to say that it is frivolous and vexatious, because the application is, *ex hypothesi*, not that upon which alone they are to pass a judgment, viz. an application to state a case upon a question of law.

Having regard to the entire of this case, I am of opinion that there was involved in the second question a question of law of difficulty and materiality, which appeared upon the face of the proceedings, a question which the Land Commission had not considered, in consequence of it not having been clearly brought to their notice, but one which went to their jurisdiction, and which it was their duty to have considered and determined at the hearing, whether it was brought to their attention or not. When that question was brought before them on the application for a case stated (at which time I hold that their final order had not been pronounced, and that their jurisdiction had not terminated), it was their duty to have then considered and determined it. I may state the question thus:—Whether it was competent for the Court (having regard to the terms of the documents, the dates, the subsequent occupation, and the other evidence in the case, and drawing in favour of the tenant every inference of fact that could legitimately be drawn), to hold that the tenant was a present tenant within the meaning of the statute. I freely admit that if the learned Commissioners had considered this question No. 2, and having either held that it was a question of law, or having evolved from it such questions of law as it involved, had judicially decided that the application to state a case on such questions of law was frivolous and vexatious, I should have had no right to review their judgment. I arrogate no such jurisdiction. But I hold that their own order shows that they have not so decided. Their determination judicially shows that they held that there was no subject-matter, in reference to which they had jurisdiction to pass judgment that the application was frivolous and vexatious.

Appeal. 1893. THE QUEEN v. IRISH LAND COMMISSION. Palles, C.B.

Then, as to the appeal, if the Land Commission, having the entire case before them, had declined to give liberty to appeal, their decision would not have been subject to review; but whilst I reject the argument for the prosecutor that the reasons for that decision were based on considerations which ought not to have been taken into account, I hold that, as the case was not fully determined at Monaghan, their jurisdiction to grant or refuse that liberty was not exhausted by a refusal before they had arrived at an ultimate decision of the case; and I hold that so long as there was jurisdiction to state a case, so long there was jurisdiction to grant liberty to appeal. I hold that when they refused the application, they had not before their minds, and did not judicially determine, the application, by reference to the questions of fact actually arising in the case, the consideration of which was necessary, as a condition precedent, to their finally and definitively determining whether the case was a fit one for an appeal. Whilst the decision in fact as to the extent of the suburbs of Monaghan, was one which they properly decided ought not to be reviewed on appeal, the Commission has not as yet considered whether the inference of fact that the tenancy was one from year to year (if by law it can be drawn), is a matter as to which there ought not to be an appeal. I hold, consequently, that the prosecutor is entitled that the Land Commissioners should re-consider that application, with the knowledge and by the light of the questions now sought to be raised.

Again, I am of opinion that, whilst it cannot be open on a case stated to determine whether a particular inference of fact was properly drawn, if there was evidence from which in law it could have been drawn, the question whether by law such an inference can be drawn from the facts is a question of law arising in the proceedings, and that under the statute the landlord has a right, irrespective of any leave given by the Land Commission, to have a case stated upon that question, unless there is an affirmative determination by the Land Commission that the application to state it is frivolous and vexatious. I am of opinion that they have not considered that question, and that for that reason they ought now to consider an application for liberty to state a case upon that question of law.

In conclusion, then, my opinion is that a *mandamus* ought to

go to the Land Commission to hear an application, either that the prosecutor be at liberty to appeal from their order, or that they shall state a case for the opinion of this Court upon the question of law which I have mentioned. We shall, however, put a stay upon our order, to enable the Land Commission, if they think fit, to exercise their statutable jurisdiction of re-hearing the case.

FITZ GIBBON, L.J.:—

I wish first to state that, in arriving at my conclusion, I do not consider whether an order at the present stage can or cannot be carried further, as distinguished from an order made after writ issued, which would certainly be subject to appeal. I could not form an opinion in any case, or at any stage, under a higher sanction than that under which I have now formed my conclusion, and, doing my own part to the best of my ability, I do not consider what a higher tribunal might do, or whether there is or is not an appeal.

Very early in the argument I said that I would be no party to any order that would prevent the Land Commission from re-considering its own action, and dealing with the case in any way conducive to justice, not under compulsion, but in the voluntary exercise of its duty to do considered justice. The order which the Lord Chief Baron and I propose to make will give the Land Commission—what I would expect any Superior Court to give to me—the fullest opportunity of dealing with the whole case so as to do ample justice, with any assistance that can be derived from the discussions which have taken place in the Queen's Bench and here.

It is essential, at the outset, to define the question of jurisdiction, and the nature of the jurisdiction at issue. This Court has rarely, if ever before, stood to the Land Commission in the controlling relation in which it stands in this case: though, time after time, it has been our duty to stand towards that Commission in the different relation of an appellate or advising tribunal, which we do in the ordinary land appeals, or when considering cases stated by the Land Commission. Therefore, as regards every question of right between the landlord and the tenant, every remark now made must be strictly limited to showing that it is a question worthy of consideration, but which has not yet been considered;

Appeal.
1893.
THE QUEEN
v.
IRISH LAND COMMISSION.
Fitz Gibbon, L. J.

and we should do wrong if we went beyond that, and announced, or even formed, any conclusion which would prevent either the Land Commission or ourselves in case of an appeal or case stated, from discussing and deciding it when fully heard. But surely it will be of assistance to the Land Commission to point out that the remarks of every judge who has heard the case, here or in the Queen's Bench, indicate how very far any one who has given judicial consideration to the matter has been from arriving at the conclusion that the question, to which we think that full consideration has not yet been given, is either frivolous or vexatious, or one on which the better course would not be, that, if reviewed at all, it should be fully reviewed upon an appeal, both as a question of law and as a question of fact. It is a question so difficult and important that I think it only just to the Land Commission to give it the opportunity of which, in the wise discharge of its duty, I have no doubt that it will avail itself, of considering the question in all its aspects, both of fact and law, before arriving at a conclusion that it is not worthy of an appeal, if desired by either party. I will not anticipate the arbitrary repetition of the refusal of an appeal, as frivolous and vexatious, which every Judge who has heard the case, in the Queen's Bench and here, has regretted to find refused at all.

Repeating that any observations which I make upon the question are not to be taken as deciding it, but only as made for the purpose of showing that it is a substantial and doubtful question, I have also to premise that in any remarks which I make upon what took place before the Land Commission, I trust I shall not be taken as commenting upon the mode in which that tribunal has discharged its duties; but only as referring to the course of the proceedings for the necessary purpose of justifying the conclusion, which is the foundation of my judgment, that there are matters at issue in this case which it was the duty of the Land Commission to consider, and which have not yet been considered.

I think I can make my views most intelligible by considering, first, the merits of the case, not the merits as between the landlord and the tenant with reference to the holding, but the substance and materiality of the question which the landlord seeks to raise; and, secondly, what is the law bearing on the present position of

the case, as to the landlord's right to insist on the consideration of that question; I mean the law both as regards our jurisdiction to require the Land Commission to consider the question, and also as regards the procedure in *mandamus*. If there is a substantial question which has not yet been judicially considered, if there is jurisdiction to require its consideration, and if the rules of procedure do not debar this Court from requiring its consideration at the present stage, there only remains the final question whether the applicant for relief has, by his own conduct, deprived himself of his right.

The foundation of the whole matter is the Act of 1881, section 48. That section, in its sub-section 1, for the purposes of the Act, gives the Land Commission full jurisdiction to hear and determine all matters, whether of law or fact, and provides that it shall not be restrained in the execution of its powers by the order of any Court, nor shall its proceedings be removed by *certiorari* into any Court. Under sub-section 5, every decision of the Land Commission is final, save as by the Act provided. If this enactment were unqualified, and the Land Commission had pronounced a final order, there would be no more to say than that the very finality of its action should make it the more careful. But there are two conditions precedent to the valid exercise of that final jurisdiction. The first condition is in sub-section 2: "The Land Commission *may*." I respectfully tender to its consideration the following words—"*of its own motion*, or *shall* on the application of any party, unless it considers such application frivolous and vexatious, state a case in respect of any question of law arising in such proceeding, and refer the same for the consideration and decision of Her Majesty's Court of Appeal in Ireland." The following paragraph of the same sub-section, says: "The Land Commission may also, in case it thinks fit, permit any party aggrieved by the decision of the Land Commission to appeal in respect of any matter arising in such proceeding."

Both these clauses, under identically the same sanction, require an exercise of judicial power by the Land Commission. It makes no difference whatever, for the present purpose, that the exercise of jurisdiction, *after* the Land Commission has *considered the case*, is in one case mandatory, and in the other discretionary.

Appeal. 1893.

THE QUEEN v. IRISH LAND COMMISSION.

FitzGibbon, L.J.

In both cases, before deciding what it will do, it is equally bound to consider the case judicially, in all the aspects that, according to law and procedure, are fairly open to the parties. When a party applies for the statement of a case upon a question of law, he must have it, and the Land Commission must grant it, unless it judicially considers the application frivolous and vexatious. When the party asks for an appeal, he *may* have it, if the Land Commission thinks fit to permit it. But in both cases the obligation judicially to consider and decide the question whether it will "think fit" to permit an appeal or not, in the one case, and to consider whether the application to state a case is frivolous and vexatious in the other case, is, in my opinion, absolutely identical. It has not been disputed that the Land Commission is subject to the ordinary law and procedure in *mandamus*, nor is it denied that it is liable to *mandamus*, if it be shown not to have fulfilled the obligation which the Act throws upon it, of giving to either of the questions I have mentioned due judicial consideration. Therefore, the points to which we have to address ourselves are clear and simple; they are these—1, Was there an application to state a case on a question of law, and if there was, has the Court considered whether that application was or was not frivolous and vexatious, and judicially decided that it was so? 2, Has the Court judicially considered whether it was a fit case in which to permit an appeal, and judicially decided that it was not?

Observe how this view of the case identifies, as it were, for one purpose, the two applications to which I have referred. How is it possible to avoid the conclusion that if the Land Commission had not the whole case before it, or did not consider the whole case, upon the question of permitting an appeal, it equally had not the whole case before it, and equally did not consider the whole case, when determining that the application to state a case was frivolous and vexatious? Again, if the question which it ruled to be frivolous and vexatious was different from that which was present to its mind when considering the application for an appeal, how can it have judicially considered the main question upon the application for the appeal? The position of the Land Commission is contradictory at the two stages of the case, because, having first ruled at Monaghan that it would not permit an appeal, but indi-

cated willingness to state a case, it afterwards ruled in Dublin, when another question had been raised, that it would not state a case. For the later decision, it at first gave no reason, then gave, as the only reason, that the application was frivolous and vexatious, and finally added a second ground, which the Lord Chief Baron has already shown to be inconsistent with the first and only statutory ground.

The next matter for our consideration, assuming that there was a substantial question between the parties, is whether it was raised too late, according to the rules of procedure, or whether, though not too late, it was sought to be raised under circumstances which should preclude the party from raising it?

Now, I have written the question which the Chief Baron and I believe to be material in three forms. It may be stated as a pure question of law, as a pure question of fact, or as a mixed question of law and fact. "Was there any evidence that the tenant, at the passing of the Act of 1881, held on any other terms than those contained in the documents of 1878 and 1880, and, if not, was his tenancy one to which the Land Act applied?" This is a pure question of law, on the construction of the documents and of the Act, and on the effect of the other evidence.

Now, frame the question in this shape:—"Did the tenant, at the passing of the Act of 1881, hold on the terms contained in the documents of 1878 and 1880, and if not, upon what other terms did he hold?" That is a pure question of fact, but when the terms of his tenancy were ascertained as a matter of fact, it would become a question of law whether the terms under which he held gave him a tenancy within the Act.

But both these forms of the question may be combined in a third form of words, viz.:—"Whether the tenant was a present tenant, as defined by the Act of 1881?" That is *verbatim* the question which appears on the draft case, and which the Land Commission refused to be made the subject either of an appeal or of a case stated.

Now, what occurred at the hearing in Monaghan? I shall take it, as far as possible, not from affidavits, but from the learned Judge, for I never like to see what occurred in Court made the subject of affidavits, and I will not refer to affidavits as to any

Appeal.
1893.
THE QUEEN
v.
IRISH LAND COMMISSION.
Fitz Gibbon, L. J.

matter on which I can refer to the Judge himself. In his judgment he says:—"The contention was whether there was any agreement come to whereby the tenant *deprived himself* of the right to avail himself of future legislation." If the Judge meant to say that it was contended that the tenant had made any contract outside the written contract, depriving himself of the benefit of the Land Act, he raised a contention which no one else had suggested. If, on the other hand, he meant that the contention arose on the written contract, supplemented by the other evidence, he shows that the contention was the very one which I have already shown to be a pure question of law.

But one of the most remarkable circumstances in the case is that the fair rent order, pronounced in Monaghan, but not drawn up till long after, states on the face of it that, "*On reading the documents* endorsed on this order, and on hearing counsel, the Court rules that a fair rent shall be fixed." The only documents endorsed are the original lease of 1824, the agreement of 1878, the agreement of 1880, and certain letters of the Bishop and the agent of Lord Rossmore. The oral evidence is not referred to at all on the face of the order, and though I admit that the Land Commission would be perfectly within its right in acting on whatever oral testimony it received, the fact remains that a material part of the evidence on which the fair rent order was made was documentary, and the construction and effect of that evidence can raise questions of law only.

We were much pressed with the "injustice" which would be done to the tenant if we granted the *mandamus*, because it was said he was prevented from going into the full facts of the case. As to that, I have already said that I decline to make any order which would prevent the Land Commission from going into any evidence that either party can bring before it.

But the order, as it stands, does not show that payment of rent, or receipts, or anything else, was relied on as evidence of the creation of a present tenancy from year to year, subsequent to the expiration of the agreement of 1880, and the tenant's counsel would have a very uphill course if he had to argue that the Bishop had a tenancy on August 22, 1880, to which the Act would have applied if it had passed a year sooner. If he had not

such a tenancy in 1880, the question is whether there is any evidence that he got it before August 22, 1881? How did he get it, and when? A receipt has been produced here, in the ordinary form of an agricultural tenant's receipt for rent paid under a tenancy from year to year, but it refers to several tenancies besides, of which we know nothing. Can anyone exaggerate the gravity of the question whether there is any evidence that, within nine months after the expiration of the later of two agreements, not creating any tenancy to which the Act would apply, a new tenancy from year to year, to which the Act did apply, was created? In view of the fact that the tenancy in 1878 was succeeded by a tenancy without writing in 1879, and that this again was succeeded by a tenancy under an identical writing in 1880, is it not a very material and substantial question of mixed law and fact, or of the existence of legal evidence, whether the tenant held in 1881 on any other terms than those on which he had held in 1878, in 1879, or in 1880? Was it not a grave question, of pure law, whether there was any evidence, in any one of these years, of a tenancy from year to year upon any terms other than those of the written documents? In my opinion, any tribunal which considered the matter judicially could not have failed to see that it was a substantial question, worthy of an appeal, whether there was, in fact, in 1881, any tenancy different from that which had existed, in 1878 and 1880, under the written agreements; and, secondly, that it was a most substantial question of pure law, upon which the party was entitled to state a case, whether there was any evidence from which the inference of such a tenancy could be drawn? No Court could consider the rights of the parties satisfactorily, upon this second question, if it first, before settling the form of the question, put itself under the ordinance—"We will not allow any appeal, and we will only state a case upon a question of pure law," and that at a time when it had not considered the matter at all in its aspect of a mixed question of law and fact.

I think it is plain from what occurred at Monaghan that the matter on which final judgment was reserved really included the question now sought to be raised. Mr. Justice Bewley mentions three contentions as having been put before him during the hearing of the case. The first, he says, was the contention that it

Appeal. 1893.

THE QUEEN v. IRISH LAND COMMISSION.

Fitz Gibbon, L.J.

was a town park. With all respect, that form of putting the contention is very misleading. A tenancy of a town park is just as much within the Land Act, 1881, as a tenancy of any other land, if the tenant does not reside in the town or suburbs. It is not the fact that the land is a town park which excludes the tenancy from the Act; it is the place of the tenant's residence that has that effect. Therefore, the moment the Court said, "We find, as a matter of fact, that the tenant does not reside within the town of Monaghan or its suburbs," no question remained which could depend on the contention that the holding was a town park. But the learned Judge mentions two other points: first, the question of estoppel, that is—that, though the holding was not a town park, the tenant, by his contract, had bound himself not to deny that it was. If the contract had contained a recital, "Whereas it is agreed that this letting shall be made upon the basis that the Bishop's residence shall be deemed to be within the suburbs of Monaghan," I should like to know whether that would not raise a serious question of law, viz.—"Whether there was an agreement come to whereby the tenant deprived himself of the right to avail himself of future legislation from which residents in suburbs were excluded?" And this very point Mr. Justice Bewley states, in so many words, when he says:—"If it were possible to show that the parties had contracted themselves out of future legislation, this contention might prevail." Can that mean anything else than this: "If you can show that, under the contract between the parties, future legislation does not apply, we will allow you to show it?" He says, further:—"If the landlord can show us any question of law that should be stated for the Court of Appeal we shall state a case, but our findings on the facts appear to me to put the town park question out of the case altogether, *unless it be made upon estoppel or contract.*" I give the learned Judge full credit for having said:—"I undertake to do whatever it is my duty to do under the Act of Parliament." It was his duty to state a case on any question of law, unless he judicially considered that the application for it was frivolous and vexatious. Whether he stopped counsel or not, whether Mr. Law stated his point, or whether he did not, the Judge at Monaghan reserved two things for Dublin—the

formulating of the question, and the consideration whether it was a question of law or not; and he also referred to the question of estoppel, and to the question of the effect and construction of the contract, as two questions distinct from the question of town park, and as questions to be reserved for Dublin.

Now, I necessarily refer to the affidavits for what I cannot find in the judgment. The affidavit of Mr. Rushe states, that after Mr. Gordon had put the question about the town park, Mr. Law, after apologising for having interrupted his lordship when giving his judgment, said:—"There was one other point he and Mr. Gordon would ask the Court to reserve, that it was a point of law, that if they might send it in the statement of the case it was right to mention it then. My counsel, Mr. Teeling, immediately said that, on the part of the tenant, he would ask Mr. Law to say then what his point of law was. Mr. Law, without stating what the point of law was, said he was quite ready to mention it, but that they would send it in in the case stated. Mr. Justice Bewley then said that the landlord might raise *any question of law that appeared on the evidence*, but that what that question was he did not see up to the present moment." If he did not see what the question was, can he have judicially considered whether an appeal should be permitted upon it, if it should afterwards turn out that it involved matter of fact? But the affidavit of the officer goes further, and it is made presumably with the concurrence of the Land Commission, because it is not the statement of any officer who was present, but it is the account which is believed to be correct by another officer who was not present. The statement is this:—"Mr. Gordon, Q.C., applied for liberty to appeal, but the Land Commissioners *considered that it was not a case in which an appeal should be allowed*, but stated they would permit a case to be stated, if Lord Rossmore's counsel could show them *any question or questions of law open on the evidence* given, which were suitable for the determination of the Court of Appeal." This proves that there was a decision not to allow an appeal, before the landlord's counsel had shown what the question was which he desired to raise. The officer expressly says that this occurred "after the judgment was concluded." He contradicts the statement of the solicitor for the landlord, "that at the conclusion of the judgment, or at any other time, Mr. Law mentioned any

Appeal. 1893. THE QUEEN v. IRISH LAND COMMISSION. Fitz Gibbon, L. J.

points that he was anxious to raise, or that Mr. Justice Bewley or any other member of the Court said it was too late to entertain them." But he significantly adds :—" Mr. Law made some statement to the effect that there was another point of law that he could send in in the statement of the case."

After that, it seems to me to be impossible and unfair to deny that both the Court and the counsel postponed the formulation of the question, as well as the consideration whether it was a question of law or not. That reduces the question on this branch of the case, for our purpose, solely to the question, whether, when the draft case was lodged, the Court was justified in coming to a judicial conclusion that it did not raise any question of law at all which was not frivolous and vexatious.

But I am not satisfied that there was, in fact, any valid ruling upon the question.

The Act of Parliament, section 48, sub-section 5, contains this proviso :—" Provided always that any order or decision made by three members of the Land Commission shall not be reviewed, rescinded, or varied, except by three members of the Land Commission." The officer of the Court proves what was done in Dublin in these words :—" *Mr. Justice Bewley* carefully considered the case and the questions raised upon it, and, after stating that there were matters stated in the draft case which were not all in accordance with the evidence given on the rehearing, *gave judgment* that the questions proposed to be stated for the determination of the Court of Appeal were all questions of fact, or of mixed law and fact, and that if the facts contained in them could be separated from the questions of law, the questions of law were of no substance, and unsuitable to be submitted to the consideration of Her Majesty's Court of Appeal, and that the application to state a case on behalf of the landlord was frivolous and vexatious, and *he therefore refused it.* Subsequently, at the request of the landlord's counsel "—the affidavit does not say when, or how long after—" *Mr. Commissioner Fitz Gerald joined in the order* refusing the application," after having considered the case, and the questions therein raised, and entirely agreeing with Mr. Justice Bewley, that the application to state a case was frivolous and vexatious. The affidavit does not state that Mr.

Commissioner Fitz Gerald considered any of the other points, as to the nature of the questions, &c., nor that he conferred at all with Mr. Justice Bewley before he "joined in the order."

With all respect, I cannot hold that a decision which, to be valid, must be that of more Judges than one, can be arrived at, as it were, in Indian file, by one Judge considering the matter at one time, and another at another time; each Judge must assist at the discussion, and the judgment must be the joint judgment of all. It appears to me that a serious question was brought by counsel before Mr. Justice Bewley in Dublin, affecting the case heard by the full Commission in Monaghan, and the respondent has failed to satisfy me that this question was considered by the same tribunal which had arrived at the conclusion announced in Monaghan. If the case had been reconsidered by the full Commission, nothing is more probable than that the Court would have said, "Believing that if there were any substantial questions in the case, they were purely questions of law, we refused to permit an appeal, but we promised to state a case for you, if you could show us that any proper question could be raised. Now, on reading your draft case, we find that the proper form of the question involves mixed law and fact; we will therefore reconsider what we said at Monaghan. We will consider the whole case; if your question has any substance in it, we will consider whether we will give an appeal, so as to have the whole case reviewed, or we will state a case for you, if, on the question of law, full justice can be done." But as this course was not taken, we cannot avoid the result that, if the question submitted in the draft case was capable of raising a question of law, the Land Commission was bound to state it. We are giving the *mandamus* in a form which adopts the very words of the draft case, making no alteration whatever in the question, but merely prefacing it with the words "as matter of law, and drawing any inferences of fact favourable to the tenant, which lawfully arise upon the evidence." This preface is only what is implied from putting the question on a case stated at all, because the jurisdiction to state such a case is confined to questions of law, and we only make it clear, by these words, that the question is one of law, to be stated after drawing all legitimate inferences of fact in favour

Appeal. 1893.

THE QUEEN v. IRISH LAND COMMISSION.

Fitz Gibbon, L. J.

of the tenant. The absence of any grounds in the order as originally pronounced, the subsequent statement that the application was frivolous and vexatious as the sole ground, and the final making-up of the order on two grounds, of which one, namely, that the question is not a question of law, is erroneous, with the account of the mode in which the case was considered in Dublin—all these circumstances show that there was not any judicial consideration, and consequently that there was not any judicial determination, of the question whether the application was frivolous and vexatious, and therefore a *mandamus* lies.

I am of opinion that a similar infirmity attaches also to the mode in which the question whether it was a fit case for appeal was disposed of. I should have been content to direct this appeal to stand over, to allow an application to be made to the Land Commission to do justice by reconsidering the whole case, in full confidence that an appeal would at once be permitted, when the views of the Queen's Bench, and of this Court, were made known, but for the fact that, if we took that course, we should be trespassing on ground where we have no jurisdiction, and would seem to shrink from making the order which we have jurisdiction to make; but, by putting a stay on the *mandamus*, the same result will no doubt be attained.

The only other matter to which I must refer is the question whether the landlord has debarred himself, by his own conduct, from raising the question now, or whether he is prevented from raising it by the rules of procedure. I think there are two answers to that point; one general, and applying to all cases, the other arising on this particular case. It is, in my opinion, never too late to show that a proceeding of an inferior Court is *without jurisdiction*. A case on *mandamus* cannot differ in this respect from a criminal case. If the Court, has, on *certiorari*, directed an inferior Court to send up an order for consideration upon a particular question, and if, on the return, it appears that the inferior Court has no jurisdiction to do anything at all in the case, the authorities are conclusive that the whole proceeding must be quashed. *A fortiori*, if on a *mandamus* to do a particular thing, it turns out that there is no jurisdiction to do anything, the same result will follow. But in this particular case, from beginning to end, I am

satisfied that the omission to define the particular question at an earlier period was occasioned by the action of the Land Commission itself. In my opinion, therefore, it does not lie in the mouth of the Land Commission to raise the point that it is now too late to raise any question of law, or so to amend or qualify the statement of the question as to make it a question of law. I could understand the party raising this point. I cannot understand its being raised by counsel for the Land Commission.

As to the argument of hardship, there must be hardship, whichever way the case is decided, arising from the course taken throughout by the Land Commission, but the utmost hardship to the tenant which can arise from granting the *mandamus*, in addition to some costs, will be depriving him of a temporary advantage which he never ought to have got. We are guarding fully against any risk of his being deprived of any advantage which a full hearing of the case can give him. On the other hand, the expense and hardship on the landlord are the same as on the tenant, if the case is further heard; but if we were to refuse the *mandamus*, the injustice which would be done to him, as regards the entire subject-matter of the litigation, would be absolutely irreparable, if he has the right which he asserts.

I have to apologise for the length of my judgment; but it is due to the Land Commission, and to the parties, that we should give every assistance in our power, by a full and candid explanation of our views, in pointing out, if there has been any miscarriage of justice, how it may be set right by the Land Commission without any further intervention of any outside tribunal. I concur in the decision of the Lord Chief Baron that an order for a *mandamus* should go, but that the writ should be stayed as he has mentioned.

BARRY, L. J.:—

It is very distressing in this case to feel that whatever decision we arrive at will be attended with injustice or hardship. On the one hand, a very serious hardship would be inflicted on Lord Rossmore by our refusal to put the case in a train for further investigation, so as to enable him to raise the question of law, which, in my opinion, was for the first time suggested, in any

Appeal. 1893. THE QUEEN v. IRISH LAND COMMISSION. Barry, L.J.

tangible and formulated shape, in this Court and from the Bench. On the other hand, to arrive at the conclusion that we ought to issue the *mandamus* by suggesting an alteration of what has been the course of procedure in the Land Court, and, by a very minute and technical criticism of the action of that Court, with the result of sending the tenant to encounter a new course of expensive litigation, to resist a point never urged against him in the Court below, is, in my mind, a very severe injustice indeed. I am glad—very glad, as it relieves me from a sense of any great responsibility—that the view that has been taken by my colleagues enables this Court to arrive at the conclusion that the latter is the better (as it is certainly the more sympathetic) mode of dealing with the case. My judgment, if I were left to myself, would be the other way. My dissent from the judgment of my colleagues would be unavailing; but if I assented I would certainly feel that I was making myself a party to, I believe, the strongest ruling ever made upon an application for a *mandamus*. It is a complete alteration of the scope, effect, extent, form, and operation of the *mandamus* that was applied for, and refused by the Court of Queen's Bench, in the exercise of its high prerogative jurisdiction. We alter the whole of the application, and give a thing that was never asked for in the Court below or in the Queen's Bench.

Now, let me consider the circumstances under which an order is about to be made against the Land Commission, suggesting that they have manifested want of accuracy in the discharge of their important functions. It is open to argument that *mandamus* does not lie to that Court. Perhaps there may be a great deal more to be said upon that subject if ever the question is raised. That question has not been raised, still, at the same time, I cannot help thinking that the mode of procedure to be applied to a Court, such as the Land Commission, appointed by statute, with such important duties, and having such enormous powers, merits somewhat more consideration than would be given in the case of a bench of magistrates refusing to convict a man for trespass.

How did the case come before the Land Commission? It first came before the Sub-Commission, and it is an undisputed and indisputable fact that the only question argued before the Sub-

Commission was whether the holding was a town park or not. Well, the Sub-Commissioners exercised their own vision in the matter; they did a thing which has been done over and over again, which I was astonished to hear argued to be an improper thing for a Judge to do, to exercise his own eyesight and vision. They went and saw the place, and they held that the Bishop did not reside within the suburbs of Monaghan. They saw the place and heard the evidence, and they reported to the Head Commission that the only question was, town park or no town park, and that the definition under the statute of town park did not apply, because the Bishop did not reside within the suburbs.

The case then came for rehearing before the Land Commission, and I am now again stating that which is an undisputed fact. Mr. Teeling appeared on behalf of the tenant; and he put forward his case, dealing with it only as a question of town park. Nobody disputes that the only matter discussed was town park or no town park. Mr. Gordon, who appeared for the landlord, did not say:—"Oh that is not the only question, there is a great deal more in the case than the question of town park." Nothing of the kind; he, too, dealt with the case as one of town park. Well, I confess I am not fond of taking short cuts. I think *via trita est via tutissima;* but if I had been in the position in which the Court was placed, with a large number of cases to dispose of, I, perhaps, would have taken the short cut. Mr. Justice Bewley said:—"We may save trouble and public time by stating that we have visited this place, the three of us have seen it, and we have clearly made up our minds that it is not within the suburbs of Monaghan." Well, does Mr. Gordon say:—"Oh, that is not the only question, because whether the Bishop's residence is within the suburbs or not does not decide the matter; there is another question, irrespective of 'town park' altogether, to be considered?" No, there is no such thing suggested. Accordingly, counsel for the landlord goes into evidence. Now, a great deal has been said about the *onus probandi*, and as to whether the Court was right in requiring the landlord to begin. Of course, we all know perfectly well that new trials have been granted where there was a wrong ruling on the right to begin; but that was where the question of the right or obligation was raised at the

Appeal. 1893. THE QUEEN v. IRISH LAND COMMISSION. Barry, L.J.

trial, where the party who wanted to begin was refused, or where the party who did not want to begin was compelled, to do so; but there was no such objection made here. I think Mr. Gordon would have shown a great deal less than his ordinary prudence if he had refused to go on; but what does he go on with? Does he proceed to argue upon the documents that are in evidence as to the question of present tenancy? Not at all: he goes into parol evidence for the purpose of proving that the Bishop's residence was within the suburbs.

Now, I must say that I think the case was put with some exaggeration by Mr. Campbell, when he said the Commissioners would not hear the case, because they had already made up their minds on the matter. I find there was a great deal of evidence given which appears on the shorthand writer's notes; but it was all on the same point—town park or no town park.

Well, on that the case concluded, and then the Land Commissioners deliver judgment, and they say:—"This is not a town park within the meaning of the Land Act, because the tenant does not live in the suburbs." It appeared that in his agreement the tenant had called it a town park, and it was contended that he ought not to be allowed now to deny it. Mr. Justice Bewley deals with that objection in this way; he says:—"There was another point raised whether the tenant could now, notwithstanding his agreement, rely upon the Land Act; but we think it impossible for him to contract himself out of the Act and we do not think that, even if it were possible for him to do so, this document amounts to such a contract."

Mr. Gordon then asked for liberty to appeal; and this is a part of the case on which I think the action of the Land Commission was more hasty, perhaps, than might be desired. For my part, I am always uneasy in my mind when deciding a case in which there is no right of appeal from my decision. However, they said they would not give an appeal, and I think that was not, after all, an unnatural thing for them to do; for my opinion, as a matter of fact, is, that the only question which had been brought before the Land Commission, up to that moment, was that of town park or no town park, and there was no question of law involved except the designation of the holding in the agreement.

They refused to grant an appeal, but then the matter occurred which has been productive of all the controversy and inconvenience in the case.

The arguments having concluded on the fourth day, the Commissioners announced that they would deliver formal judgment on the following morning, and on the following morning Mr. Law, Q.C., who had been retained on behalf of the landlord, but whose brief had been, on the previous day, transferred to Mr. Gordon, arrived, and when Mr. Justice Bewley proceeded to give judgment, Mr. Law interposed. Mr. Justice Bewley, to whom probably Mr. Law's appearance at that stage of the proceedings was as sudden and unexpected as a ghost's, said :—"Who are you? What brings you here?" Mr. Law explained that he was counsel for the landlord; but, of course, his intervention was entirely irregular. "I am delivering judgment," said Mr. Justice Bewley. What was the meaning of that? It meant: "The case has concluded; we have heard the whole of the case; we have made up our minds upon it; we have announced our conclusion; and now I am giving our formal judgment; and it is too late for you to intervene." Accordingly, judgment was given, and then counsel asked the Commissioners to state a case on the question of town park, and no doubt Mr. Law said there was another question which he wished to have stated. Now, what is the substance of the evidence as to what has been called a promise by the Land Commission, that Mr. Law should be allowed to state in his case any question of law whatever that his ingenuity might enable him to raise upon the proceedings? It is to be remembered that the Land Commission had a great deal of other work to do; and the discussion was, of course, not conducted with the same deliberation that it would have been under other circumstances; but what does the Judge say? I take it from the affidavits of Mr. Martin, Mr. Rushe, or Mr. Seaver; they all amount substantially to the same thing. What the Judge said was, "If counsel for the landlord can show us any question of law for us to reserve we will do it." Well, I assert, having regard to the previous course of the case, and the questions that alone were argued, and brought under the consideration of the Commissioners, that it is impossible for any person to understand that in any

Appeal. 1893. THE QUEEN v. IRISH LAND COMMISSION. Barry, L.J.

other way than as meaning "any question of law, having regard to what we have heard of in the case and the arguments and points that have been addressed to us." The idea that it was intended to give a roving commission to Mr. Law, to go through all the documents, evidence, and proceedings, to see if he could pick out and formulate some question that never had been suggested throughout the whole of the investigation, and to say, "There now is a question of law for you; I call on you to state that for the Court of Appeal," is, in my opinion, wholly preposterous. I believe it to be one of the fundamental rules, and the very foundation of *mandamus*, that there must have been a demand and a refusal by the Court to do the very thing you ask the *mandamus* for. The form in which the conditional order was prepared is only part and parcel of the consistent, I do not say intentional, unfairness with which, from beginning to end, the Land Commission were treated by the legal advisers of the landlord in not stating what it was they wanted.

Now, I wish to be perfectly understood on this matter. Mr. Gordon has stated that he mentioned to the Judge this point, which is considered, and rightly considered, by the Lord Chief Baron, and Fitz Gibbon, L. J., to be of such importance—a question as to the nature and quality of this tenancy. He says he mentioned it to Mr. Justice Bewley. Well, as Mr. Gordon says that he mentioned it, I have no more doubt that he did so than I have of my own existence; but that is not the question. The question is, did he put it forward in such a way as to apprise the opposite counsel, and apprise the Court of its precise nature, and that it was intended to be seriously relied on? Had the Judge an opportunity of considering it, or was it sprung upon him as a new point at the last moment? Of course I assume implicitly that Mr. Gordon did refer to it; but I do not believe that it was ever formulated either by Mr. Law or Mr. Gordon in the shape in which it has been formulated in this Court now. I believe Mr. Law had some question in his own mind about the dates: "having regard to the agreement and the dates, there is another point." Well, Mr. Teeling very properly says, that if Mr. Law had any point he would like to hear what it was; but does Mr. Law state it? He says, "I will send it in." No doubt, he says,

he was perfectly willing to state it, but Mr. Justice Bewley, no doubt considering that that would be asking the Court, in the middle of its business, to go into a provisional sort of discussion, said it would do to send it in.

Now, I say that the point that has now been raised in this Court, and upon which the two eminent lawyers sitting on my right have brought their great learning and experience to bear, was never for one moment, in the manner the law and justice require, brought to the attention of the Judge, who is now sought to be visited by *mandamus* for not doing that which he was never asked to do.

Well, it is said that the Land Commission had no materials for saying that the application to state a case was frivolous and vexatious. I assume that the question now sought to be put into the case is not frivolous and vexatious; but, even putting in that question, I say that it is, on the face of it, one of mixed law and fact; because if you take out of it the inferences to be drawn in favour of the tenant, including the finding that the Bishop did not live in the suburbs, I do not see what question of law would remain. That was what Mr. Justice Bewley meant and that is what he decided. He never was asked to decide anything else, in my opinion, I mean in the manner in which it ought to have been asked, namely, by putting the matter in plain language, such as has been used by the Lord Chief Baron and Lord Justice Fitz Gibbon. It might have been put more shortly: "Assuming that the Bishop's residence was not within the suburbs, was there a present tenancy within the meaning of the Act?" But no such question was ever stated or suggested.

As to the question about jurisdiction, I agree that, strictly speaking, jurisdiction ought to be proved in every case; but, as a matter of fact, we have been a long time dealing with the Land Act, and has it ever been the rule that the tenant shall be always required to prove categorically that he is a present tenant within the meaning of the Act? No one ever heard of such a thing. There are in every case, and before every tribunal, matters which, though they would go to the jurisdiction, if jurisdiction were challenged, are assumed, and should be held to be concluded by the conduct in the case of the parties. I think it is as

Appeal. 1893.

THE QUEEN *v.* IRISH LAND COMMISSION.

Barry, L.J.

plain as light that this case was dealt with and conducted, on the part both of the landlord and the tenant, on the hypothesis that, apart from the question of town park, a tenancy existed within the meaning of the Act of Parliament. I think it is a serious thing indeed, after a long inquiry, and after a deliberate decision of the Court, that they are to be asked to enter into a question which may have been covertly submitted to them, but was never explicitly stated in argument before them. Of course, when I say covertly, I do not mean with any design to mislead the Court, but that the question was never raised before them in the manner it ought to have been, in order to attract their notice and obtain their opinion upon it. What does Mr. Martin, the solicitor for the landlord, say? "My counsel contended that, both under the terms of the agreements, and upon the facts, the Court should dismiss the notice on the ground that the holding was a town park." In my opinion that was all that the Commissioners were called on to do, and I regard it as an injustice, not only to the tenant, but to the Commissioners, to issue this *mandamus*, which can only be based on the ground of their having refused to perform some duty, which they were duly called on to perform.

It is said, and truly, that the issuing of a *mandamus* merely puts the matter in a train for ultimate decision, so that the opinion of the House of Lords may be taken on it, and in that view such course is, upon proper occasions, often eminently just and expedient. But to issue a *mandamus* in this case, if it be followed to its legitimate result, is simply to launch the parties on a sea of costly litigation for a subject-matter comparatively trifling—is to introduce a departure, as I believe wholly unprecedented, from the established procedure in *mandamus*, and to strike a serious blow at the prestige of the Land Commission Court in respect of the finality of its decisions—it is to establish a precedent for arguing that, after a tenant applying to have a fair rent fixed, has, without any surprise or fraud on the landlord, but on full and plenary hearing in the presence of all parties, their counsel, solicitors, and witnesses, before the Sub-Commission and Head Commission, obtained from both branches of the Land Court a decision in his favour on the only ground or grounds of defence

relied on by the landlord, the landlord, by taking some abnormal and irregular proceeding before the Land Court, can obtain a *mandamus* to compel the re-opening of the litigation on some ground of defence never, whether it be by misfortune or miscarriage, brought by the landlord in the ordinary course of procedure before the Land Commission.

However, perhaps no substantial harm is done by the frame of the order, because it enables the Commissioners to do that which, I have no doubt, they will be very willing to do, and ought to do, under the very peculiar circumstances of the case. They will consider the new question which is proposed to be raised on the face of the *mandamus*, and I am satisfied they will do what is just under the circumstances.

The order made by the Court was:—

Discharge the order appealed from, and order that a writ of *mandamus* do issue, directed to the Irish Land Commission, commanding that the said Commission, according to their authority in that behalf, do hear and determine the application of Lord Rossmore, in the matter depending before the said Commission, wherein the Right Rev. J. Donnelly is tenant and Lord Rossmore is landlord, that the said Commission either do permit the said Lord Rossmore to appeal against the decision of the said Commission in the matter aforesaid pronounced on the 4th November, 1892, or state a case for the decision of the Court of Appeal in respect of the following question of law arising in the said proceedings, viz.: Whether as matter of law, upon the documentary and other evidence in this matter, assuming all matters and inferences of fact which legally arise to be decided in favour of the tenant, the said tenant was a present tenant as defined by the Land Law (Ireland) Act, 1881. Let the issue of the writ be stayed until the first day of Michaelmas Sittings to enable the Land Commission of its own motion, or on the application of either party, to rehear the said matter, and to review, rescind, or vary their said order or decision of the 4th November, 1892; and in the event of such rehearing the said writ not to issue without further order of this Court.

Solicitor for Lord Rossmore: *Joseph Wright.*
Solicitor for the Land Commission: *W. Alexander.*
Solicitor for Dr. Donnelly: *D. C. Rushe.*

R. D. M.

Appeal.
1893.
Nov. 10.

HOLLAND *v.* GRAHAM (1).

Parliamentary franchise—Occupation as tenant—Service of eviction notice—Expiration of six months—Demand of possession—Summons for possession—Continuance in occupation without redeeming or paying rent—Land Law, Ireland, Act, 1887, *sect.* 7.

On June 1, 1892, H., who was then the tenant of the qualifying premises but against whom his landlord had obtained an ejectment decree for non-payment of rent, was served with an eviction notice under section 7 of the Land Law (Ireland) Act, 1887. The six months expired, and in December, 1892, possession of the said premises was demanded, and a summons for possession served. No further proceedings were taken, and H., without having redeemed or paid any rent for the qualifying premises, continued in occupation of them during the qualifying year :—

Held (*diss.* Palles, C.B.), that H. was not entitled to the franchise.

Appeal by John Holland against the decision of Mr. D. F. Browne, one of the Revising Barristers for the north Tyrone division, declaring that the appellant was not entitled to the Franchise.

The facts appear from the case stated, which was as follows:—

"At a Court held by me, as one of the Assistant Revising Barristers of the county of Tyrone, at Newtownstewart, for the revision of the list of Parliamentary voters within the polling district of Newtownstewart, for the north Tyrone division of the county of Tyrone, on the 29th day of September, 1893, and following days, the name of said John Holland appeared on the register (list No. 10) as 'rated occupier, £10 10*s*., Envaugh,' and was duly objected to by the said William Graham.

"The following facts were proved :—

"The said John Holland was in occupation as tenant from year to year of the qualifying premises, consisting of a farm of land and buildings thereon, and was duly rated therefor at £10 10*s*.

(1) Before Sir Peter O'Brien, C.J., Palles, C.B., and FitzGibbon and Barry, L.JJ.

On the 7th April, 1892, the landlord obtained against him a civil bill ejectment decree for non-payment of rent in respect of said premises, and on the 1st June following served on the defendant the notice prescribed by sub-sect. (1) of sect. 7 of the Land Law (Ireland) Act, 1887.

"After the expiration of six calendar months from the service of said notice, namely, in December, 1892, possession of said premises was demanded from said John Holland by the landlord, and a summons for possession served, but not proceeded with. No further proceedings have been taken, and the said John Holland still continues in occupation of the said premises, but has not redeemed or paid any rent for same. I expunged the name of said John Holland from the register.

"Due notice of appeal was given, and being so required, I named Lewis M. Buchanan, Clerk of the Peace for said county, to be respondent, with the said William Graham, in such appeal.

"If my decision was wrong the register should be amended by restoring thereto the name of the said John Holland."

Healy and *M. J. Kenny*, for the appellant:—

The voter is protected by the saving clause at the end of sect. 7 of the Land Law (Ireland) Act, 1887. The service of an eviction notice under this section is not to affect the franchise. The period of six months cannot be calculated except by having regard to the service of this notice. The only *datum* for calculating the period for redemption is the service of the notice. The only change in the *status* of the tenant that takes place is by the service of the notice; but the service of the notice is not to affect the right to vote. For all other purposes Holland is to be deemed a caretaker, but for the purpose of the franchise he is tenant until the landlord physically resumes possession.

[They referred to *Montgomery* v. *O'Hara* (1) and *Thompson* v. *Lord Templetown* (2).]

Ross, Q.C., for the respondent:—

The saving clause says the vote is not to be lost by reason of

(1) 24 Ir. L. T. R. 2. (2) 27 Ir. L. T. R. 55.

Appeal. 1893.

HOLLAND v. GRAHAM.

service of the notice *only*. Here there has been a great deal more than the mere service of the notice. The time for redemption has expired, there has been a demand of possession, and service of a summons. The object of the Legislature in inserting the saving clause was to prevent the destruction of the vote by the merely technical breach in the occupation which arises on the service of the notice, after which the tenant is to be deemed a caretaker. [He referred to *Larkin* v. *Clarke* (1) and *M'Gee* v. *Buchanan* (2).]

SIR PETER O'BRIEN, C. J.:—

The majority of the Court are of opinion that the decision of the Revising Barrister is right. We think the case turns upon the effect to be given to the word "only" in the last clause of sub-sect. 3 of sect. 7 of the Land Law (Ireland) Act, 1887. That section substitutes a written notice for the execution of an ejectment for non-payment of rent; it prescribes the mode in which that notice is to be served or posted; and then it enacts that, "upon such service or posting the tenancy in the holding shall be determined as if a writ of possession under the judgment had been duly executed."

Now, before the passing of this Act, if a writ of possession under a judgment in ejectment for non-payment of rent had been duly executed, the man put out of possession by virtue of it would have lost his right to a vote unless he had paid the rent during the period of redemption, and complied with the conditions of 48 Vict. c. 17, s. 7: *Larkin* v. *Clarke* (1). Therefore, if the 7th sect. did not contain the saving clause, which I am going to read, the mere service of the notice of eviction under sub-sect. 1 would have disqualified for the franchise the tenant upon whom it was served. The saving clause is this:—"A right to be registered as a voter, or to vote at any Parliamentary or other election, shall not be affected by reason only of the service of a notice or notices under this section." In my opinion, there was considerably more than the mere service of the notice here. Sub-sect. 2 says:—"Upon the determination of the tenancy by the service of such notice as aforesaid, every person upon whom such notice is served shall

(1) Lawson, Notes, 1886-87. p. 37. (2) Lawson, Notes, 1888-89, pp. 10, 16.

thereupon be deemed to be a person put into possession as a caretaker." No doubt the caretaker has the right of redemption at any time within six months after service of the notice; but it is provided by sub-sect. 3 that, "at the end of the period of six months from the service of the notice determining the tenancy, all right of redemption in the holding shall be at an end."

In this case not merely the six months during which the claimant could have redeemed expired, but the landlord demanded possession of the premises, and served a summons to recover possession. Having regard to the demand of possession, and the service of the summons, in my judgment there was a great deal more here affecting the right of the claimant to the franchise than the mere service of the notice of eviction. For this reason I am of opinion that the claimant's right to vote is not saved by the clause relied upon by Mr. Healy.

This is my opinion; but I feel that the matter cannot be at all free from doubt, as the Lord Chief Baron entertains an opinion at variance with mine.

PALLES, C. B. :—

I have arrived at a different conclusion. I am of opinion that the possession of a former tenant upon whom a notice under the 7th section of the Act of 1887 has been served continues for the purpose of the franchise to be occupation "as tenant" until he is actually removed from the physical occupation either under writ of possession or magistrates' order, or otherwise.

It is certain that immediately after the Landlord and Tenant Act, 1860, the possession of a tenant against whom judgment had been obtained in ejectment for non-payment of rent continued to be a possession *as tenant*, so as to confer a title to the franchise, until the actual execution of the *habere facias possessionem*. It is equally certain that the possession must still continue to be of the same character in relation to the franchise to the same period, unless a change in that respect has been made by the 7th section of the Act of 1887. That section enacts that a certain notice, thereby prescribed, shall be served or posted in the prescribed manner, and then proceeds :—"Upon such service or posting the tenancy in the holding shall be determined, as if a writ of possession

Appeal. 1893. HOLLAND v. GRAHAM. Palles, C.B.

under the judgment had been duly executed"; and "Upon the determination of the tenancy by the service of such notice as aforesaid, every person upon whom such notice is served shall thereupon be deemed to be a person put into possession as caretaker; and the enactments of the Landlord and Tenant Law Amendment (Ireland) Act, 1860, relating to persons put into possession of lands by permission of the owner as caretakers shall apply as if on the date of the service of the notice a writ of possession had been duly executed, and such person having been removed from possession, had been re-admitted as caretaker." Therefore, for all purposes to which this enactment applies, the possession as tenant ceases, not as theretofore, upon the execution of the writ, but upon the service or the posting of the notice; and in reference to all such purposes, the *status* of the former tenant is that of caretaker only, and for all such purposes the expiration of six months from the service, a demand of possession, a summons before magistrates to obtain an order for possession are all absolutely immaterial to affect the *status* as tenant of the former occupier. For all such purposes such *status* has ceased to exist. Possibly such acts might change the notional position of the former tenant as servant from that of servant under a continuing service to that of a servant ordered to quit, or whose service had been determined; but they could do nothing more.

But this enactment is subject to this proviso:—"The right to be registered as a voter, or to vote at a parliamentary or other election, shall not be *affected*, by reason only of the service of a notice or notices under this section." Now, the tenancy has been determined by the service of the notice *only*, and therefore this proviso is, in substance:—"The right to be registered shall not be affected by the determination of the tenancy in the mode prescribed by this section."

Not then being determined by the service, how has it been determined? The fact that the former tenant has remained in possession for more than six months cannot have this effect under the statute: such lapse of time determines the equitable right of redemption, but does nothing more. It does not determine the tenancy. For purposes within the section it has been previously determined. For purposes not within the section the remaining

in possession for six months cannot have any effect. Neither can a demand of possession determine the tenancy for the purpose of the franchise. To see this more clearly, let me take the case of a lease by indenture for a term of years. How is the term determined? By the service of notice only; and notwithstanding the service of that notice—which alone can alter the character of the possession for any purpose, and which cannot alter it so as to affect the right of the tenant to be registered—the possession, until actual eviction, must, in reference to the right to be registered, be deemed to be that "of tenant." Were it not for that notice, the possession, till actual eviction of the tenant, would, for all purposes, be the possession of the tenant under the lease. A demand of possession cannot change the character of the possession *quoad* the franchise, because the possession continues for this purpose to be that of the tenant under the lease, and possession under a lease cannot be determined by a demand. Neither can the service of a summons to appear before magistrates determine possession under a lease. Nor can even an order of the magistrates to give up possession, not acted upon, determine possession under a lease; for such an order does no more than adjudicate that the possession is that of the landlord, and not that of the former tenant. But it is the basis of the argument that although such possession, for certain purposes is, and from the service of the notice was, the possession of the landlord, it is not his possession for the purpose of the franchise. In my opinion the adjudication of the magistrates cannot give the possession, after the notice, a character which the statute says it shall not have—*i. e.* one which affects the tenant's right to the franchise. In my opinion the order should be reversed, and the appellant's name should be placed on the register.

FITZ GIBBON, L.J.:—

Though I am not insensible of the doubt that must attach to an opinion which is at variance with that of the Lord Chief Baron, I think the decision of the Revising Barrister right, and I think that the construction which the appellant asks us to adopt would strike the word "only" out of the sub-section on which he relies. When the prescribed notice is served, the last clause of sub-sect. 1

Appeal. 1893.

HOLLAND v. GRAHAM.

Fitz Gibbon, L.J.

states its effect—"upon such service . . . the tenancy . . . shall be determined as if a writ of possession under the judgment had been duly executed." Thus, by express enactment, a hypothetical break is made in the tenant's occupation which, if it were actual, would undoubtedly put an end to the franchise. Nor is this all. The next sentence, the first clause of sub-section 2, says, "Upon the determination of the tenancy by the service of such notice as aforesaid, every person upon whom such notice is served shall thereupon be deemed to be a person put into possession as a caretaker." The effect of this legislation is, in my opinion, to break the tenancy, and to require us to assume that the possession has been taken up by the landlord, and that the former tenant has been put back as a caretaker: and all this results without any other act than the service of the notice. Where this course is actually taken, no matter how short or formal the break may be, it has been decided that the franchise is gone. Therefore, under the "Eviction Notice" process, all turns on the effect of the saving clause. "A right to be registered as a voter, or to vote at any parliamentary or other election, shall not be affected by reason *only of the service* of a notice or notices under this section." I think the meaning of this clause is this:—Although the tenancy must be taken to be determined as if a *habere* had been executed; although the occupier must be deemed to have been put into possession as a caretaker; still, so long as nothing more has been done, if there is continuing occupation on the terms attached by the statute to occupation after service of the notice, the right to the franchise, of the man who had been tenant and is statutory caretaker, is not to be affected. But when the period of six months from the service of the notice has elapsed, then the caretaking occupier can be nothing better than a tenant at sufferance. I doubt that he is a tenant at all, or that his occupation is not that of the landlord; but, as the Act expressly continues the franchise to him in his *status* as caretaker during the six months, I am willing to hold that he retains it until something more than the service and expiration of the notice has occurred to alter that *status*. But I cannot say that a demand and refusal, after the six months, will not put an end to the rightfulness of a statutory caretaker's occupation, and consequently put an end to his franchise, when a real caretaker would,

on demand of possession, certainly become a trespasser, and could not be regarded as even a tenant at sufferance, the very lowest *status* to which the franchise can attach. Take two cases:—First, suppose an eviction notice is served two or three days before the expiration of the qualifying period; the tenant is deemed to be put into possession as a caretaker; yet the saving clause applies. There has been service "only" of the notice. Lapse of time has brought no further consequence upon the tenant beyond the incidents imputed under the statute, and these incidents do not "affect" the franchise. Therefore occupation as a "statutory caretaker," under these circumstances, must be "occupation as tenant" for the purposes of the Franchise Acts. But next, suppose that in September or October, during the qualifying period, an eviction notice is served; the six months expire; the landlord demands possession; the tenant refuses to give up; the landlord proceeds by summons before the Justices; they grant their warrant, but they put a stay upon it, which is still current when the qualifying period ends, or the warrant has, for any reason, not been executed. Is the man against whom all these proceedings have been taken still within the saving clause? Has there been in his case "only the service of a notice"? I should say clearly not; and I can find no warrant for extending the benefit of the saving clause to such a case. I think the same principle must apply to every case where, after the service and expiration of the notice, anything has been done to disaffirm the caretaker's right to continue in occupation as such. Where there has been a demand of possession, following the service of the notice, it seems to me to be leaving the word "only" out of the Act, to hold that the saving clause still applies. It is going very far even to hold that, because the Act gives a qualifying character to the statutory caretakership during the running of the notice, that character continues until the landlord does some act, such as demanding possession, to put an end to the sufferance by which the caretaker holds the possession after the period of redemption expires, but beyond that I cannot go.

In my opinion, when the initial proceeding only has been taken by the service of the notice, the occupier is not deprived of the franchise by that only; but when, after the lapse of the six months allowed by the statute, the service of the notice has been followed by

Appeal. 1893. HOLLAND v. GRAHAM.

a demand of possession met with refusal, the saving clause no longer affords any protection to the unlawfully overholding caretaker.

BARRY, L.J. :—

I concur with the Lord Chief Justice and Lord Justice Fitz Gibbon. It seems to me that to adopt Mr. Healy's contention would practically expunge the word "only" out of the proviso contained in the section. In this case a great deal more has happened than the mere service of the eviction notice. It is unnecessary for me to say that I cannot but feel doubt where the Lord Chief Baron has arrived at a different conclusion.

Solicitors for the appellant: *Todd & O'Meara.*
Solicitor for the respondent: *Wilson.*

G. Y. D.

Appeal. 1893. Nov. 13. Dec. 13.

HOLLAND *v.* CHAMBERS (1).

(DEVINE'S CASE.)

Parliamentary franchise—Inhabitant householder—Weekly tenant—Notice to quit—Summons for possession—New tenancy purporting to relate back to expiration of previous one.

In order to compel him to pay off the arrears of his weekly rent, each of several weekly tenants of dwelling-houses was served with a notice to quit, which expired during the qualifying period. Each of the tenants continued in possession of his dwelling-house after the expiration of the notice to quit for a substantial period. While so over-holding each of the tenants was served with a summons for possession. In some of these cases before, and in others after, a decree for possession was obtained, a new contract of tenancy was made, whereby it was arranged that the several tenants should continue to hold upon the old terms, and that the new tenancy was to be deemed to have commenced in each case on the expiration of the old one. It was further agreed that each tenant should pay off the arrears of his rent:—

Held (reversing the decision of the Recorder of Londonderry), that the new

(1) Before SIR PETER O'BRIEN, C.J., PALLES, C.B., and FITZ GIBBON and BARRY, L.JJ.

contract was not capable of relating back for the purpose of the franchise, and that therefore none of the weekly tenants were entitled to the franchise.

APPEAL by the objector against the decision of the Recorder of Londonderry admitting the respondents to the franchise.

The facts appear from the case stated, and were as follows:—

"1. Twenty-seven persons, whose names are set out in the schedules hereto, appeared on the Town Clerk's lists (No. 17) of persons entitled to vote, or on the Town Clerk's lists of claimants (No. 21) of persons claiming to be entitled to vote in the election of a member to serve in Parliament for the said borough, as inhabitant householders, in respect of dwelling-houses within the east and west divisions of the borough.

"2. The particulars with respect to each person in the schedules are exactly the same as those contained with respect to them in the Town Clerk's said lists.

"3. All the persons in said schedules were duly objected to.

"4. All the said persons proved that they, in fact, inhabited dwelling-houses in the borough for the qualifying year, but the question in the case is whether, in the circumstances hereinafter mentioned, they were, or are to be deemed, tenants of the said dwelling-houses for the whole of the qualifying period, or whether there was such a break in their tenancy as would deprive them of the franchise.

"5. With respect to the twenty-two persons in the first schedule hereto, they all held their dwelling-houses as weekly tenants, they were each duly served with a notice to quit, and the tenancy of each was thereby determined; in every case the notices to quit and subsequent proceedings were served and taken by the landlord to enforce payment of arrears of the weekly rent.

"6. Notwithstanding the service of the notice to quit, each of said persons continued in possession of his dwelling-house after the expiration of his tenancy for a period of time which was in each case substantial, and usually from a week to a month. In one or two cases the period of overholding was much longer.

"7. Each of said twenty-two persons while so overholding was served by the landlord with a summons for possession in the form set out in the third schedule hereto. The summons in each case was settled before any decree was obtained therein. The interval

Appeal. 1893.

HOLLAND v. CHAMBERS.

between the expiration of the notice to quit and the settlement was, in each case, part of the qualifying year.

"8. In every case the tenant and the landlord's agent were closely examined and cross-examined as to the details of this settlement; and the following facts were common to all the cases:—The tenant paid the costs of the summons and the notice to quit, which were two shillings, in case the notice had been served by a civil bill officer, and one and sixpence where the notice to quit was served by any one in the agent's employment. He also paid some rent on account of the arrears, and promised to pay up the rest, sometimes by weekly sums of a shilling, in addition to his week's rent, and sometimes by larger payments, to be paid weekly, or fortnightly, or monthly. Each tenant had a rent-book, and each agent had a corresponding ledger or collector's book, and in all cases the moneys received by the agent were appropriated to the old arrears—that is to say, in the rent-books the tenant was debited with each week's rent opposite the date on which it became due, as if there was no break in the tenancy, and on the credit side the moneys received were entered; and the result was in each case that the rent-books showed, and it was proved by the agent, that each week's rent for the interval between the expiration of the notice to quit and the date of the settlement had been fully paid. In each case the tenant remained on as tenant after the settlement for a considerable time, and he had paid some rent for the period since the settlement; in most cases he owed something for part of the period since the settlement. The agents, when asked, on cross-examination, what effect they intended the settlement to have on the notice to quit sometimes replied that they considered the notice to quit as 'cancelled,' sometimes they said they regarded it as 'extinguished,' or as 'at an end.' In all cases they used expressions conveying the same meaning—and all said they would serve a new notice to quit before proceeding again.

"9. The cases in the second schedule (five in number) are identical in their facts with the foregoing twenty-two, except that the landlord in these obtained a decree on his summons and notice to quit—in the form set out in the fourth schedule hereto—and all the cases were settled, after decree, by the tenant, who

paid the costs of the notice to quit, summons, and decree. The facts hereinbefore stated, with respect to the names in the first schedule are, with this variance, to be deemed applicable to the names in the second schedule.

"10. In this state of facts the appellant contended that I was bound by the decision of the Court of Appeal last year in *Robert Campbell's Case* (1), and by *John Coyle's Case* (2), also decided at the same time. In the latter case the Revising Barrister had stated that if the break in the inhabitancy as tenant could be waived and cured, he held the same was waived and cured by matters stated in that case; and the Revising Barrister's opinion that the break could not be waived or cured, was, he contended, upheld by the Court of Appeal. He further argued that a break having in fact occurred in the qualifying year for a period during which the voter or claimant was a trespasser, it was not competent for his landlord and himself, by subsequent contract of waiver or new tenancy, to turn the period of overholding which had elapsed into a lawful inhabitancy as tenant, and that whatever effect such a waiver or new tenancy might have as between the parties to it, the objector and the other voters in the constituency were entitled to say that the voter or claimant had not inhabited for the whole year as tenant.

"11. On the other hand, it was contended that in both the cases cited, and certainly in *Campbell's Case* (1), there was no evidence given from which a waiver, or a new contract of tenancy, could be lawfully inferred; but that in the present cases the agents had, in every case, proved a clear waiver of the notice to quit, and that I was bound to infer a new tenancy in each case, beginning from the expiration of the old one, as was done in *Tayleur* v. *Wildin* (3), and *Vance* v. *Vance* (4). They also relied on *Robert Campbell's Case* (1), and the judgments given therein.

"12. I was of the opinion, and decided, that the notice to quit in each case was waived, and, on the facts stated, I came to the conclusion, and decided, that there was in each case a new contract of tenancy between the landlord and tenant on the old terms, and that the new tenancy commenced in each case on the expiration

(1) Lawson, Notes, 1892–93, p. 4.
(2) Not reported.
(3) L. R. 9 Ex. 303.
(4) Ir. R. 5 C. L. 363.

Appeal. 1893. HOLLAND v. CHAMBERS.

of the old one, and that there was, consequently, no break in the inhabitancy as tenant during the qualifying year. I accordingly admitted all the persons in both schedules to the register.

"13. If I was wrong in drawing the inference of a new contract of tenancy, which related back to the expiration of the old one, or if such a contract, though good between the parties, is not binding on the objector or other voters of the borough, then all the names in both the schedules are to be struck out of the register of voters. If I was right as to the cases where only a summons was issued, but wrong as to the cases where decrees were obtained, then the names in the second schedule should be struck off the list of voters."

The Right Hon. J. Atkinson, Q.C., and *Cooke*, for the appellant.

Healy and *M. J. Kenny*, for the respondents.

Cur. adv. vult.

Dec. 13.

SIR PETER O'BRIEN, C.J.:—

As regards the claimants in the first schedule in this case the material facts are as follows:—They claim as inhabitant householders; they held certain dwelling-houses in the borough of Londonderry as weekly tenants; they were served with notice to quit; they overheld; they were then served with summonses with a view to getting decrees or orders for possession; the summons in each case was settled before any decree for possession was obtained. The only difference between the persons in the first and second schedule was that in the case of the persons named in the second schedule decrees were got before a settlement was made. The interval between the service of the summons in each class of case was substantial, and formed part of the qualifying period. The Recorder held that in each class of case the notice to quit was waived, that in each case there was a new contract of tenancy between the landlord and the tenant on the old terms, and that the new tenancies commenced in each case on the expiration of the old one, and that there was consequently no break in the inhabitancy as tenant during the qualifying period. I am of opinion that the decision of the Recorder as regards the cases in both schedules was wrong, and should be reversed. No doubt there

was certainly, in the first class of cases, the existence of a fact—the settlement—which would, as between landlord and tenant, subsequently to its being effected, estop the landlord from denying that the relation of landlord and tenant subsisted during the qualifying period. But in my opinion this is not sufficient to satisfy the requirements of the Franchise Acts. The question is not one of a mere fiction resting on estoppel as between landlord and tenant: it is one of what the real actual character of the occupation was during the qualifying period. The language of the 30 & 31 Vict. c. 102, s. 3, gives the franchise only to a person who, amongst other conditions, is on the 20th July "in any year, and *has during the whole of the preceding twelve calendar months* been an inhabitant occupier *as owner or tenant* of any dwelling-house within the borough." The persons in the first schedule were mere trespassers during the interval between service of the summons and the settlement, and are therefore disqualified; *a fortiori*, the persons in the second schedule, against whom decrees were obtained, are disqualified. The present point was left open in the cases hitherto decided in this Court, and it is only right by the learned Recorder to say that the case in my mind is not free from difficulty. All the names in both schedules will be expunged.

PALLES, C.B.:—

The claimants in this case, twenty-seven in number, held dwelling-houses as weekly tenants; each was duly served with a notice to quit; and the Revising Barrister finds that "the tenancy was thereby determined. Each continued in possession of his dwelling-house after the expiration of his tenancy for a period of time, which was in each case substantial; and each of them, while so overholding, was served by the landlord with a Petty Sessions Court summons to give up possession. In twenty-two of the cases before a decree was obtained, the case was settled by an agreement between the landlord and the overholding tenant. There was evidence that the new contract of tenancy was that the tenant should continue to hold on on the old terms, such new tenancy to be deemed to have commenced in each case on the expiration of the old one. The learned Recorder held that the

Appeal. 1893. HOLLAND v. CHAMBERS. Palles, C.B.

new contract was capable of relating back for the purposes of the franchise, and did relate back to the expiration of the old one; and for this reason admitted the claimants to the register.

It was held in *Magee* v. *Buchanan* (1), that where a tenant continued in occupation after the expiration of a notice to quit and demand of possession, and ultimately left the holding without entering into a fresh agreement of tenancy, his occupation subsequent to such demand was that of a trespasser, and not "as tenant," and did not entitle him to the franchise. That decision was followed in *Campbell's Case* (2). The only question, therefore, which remains for decision is what is the effect of the new tenancy upon the franchise?

In my opinion the *status* of the tenant was as follows:— After the expiration of the notice to quit, and until the service of the summons, he was tenant at sufferance: (Woodfall's Landlord and Tenant, p. 230). But upon service of the summons he became a trespasser, and his occupation continued to be that of a trespasser up to the subsequent agreement. Now, I assume that by that agreement the landlord and tenant concurred in doing everything which in them lay to constitute the latter tenant to the former as from the expiration of the former tenancy; and thus the question is, can that agreement have relation back so as to change, for the purpose of the franchise, the character of the occupation of the overholding tenant in the interval, from that of a trespasser to that of tenant? I am of opinion that it cannot. It is expressly declared that no person shall be registered unless he shall have been such occupier, *i.e.* "as tenant or owner," for the space of twelve calendar months next before the 20th July; and, in my opinion, the character of the occupation of each day during that period must be ascertained, as it actually existed on that day. Were we to hold otherwise, a title to the franchise might depend on an act done subsequent to the qualifying period. It is true that in a proceeding between landlord and tenant the new tenancy might, for certain purposes, be treated as having commenced immediately after the termination of the old one. But this result would arise from the doctrine of estoppel as between

(1) Lawson, Notes, 1888–9, p. 16. (2) Lawson, Notes, 1892–3, p. 4.

the landlord and tenant: and, in my opinion, no such doctrine, nor any relation back arising therefrom, is applicable to the title to the franchise. The right to the franchise is a matter between the claimant and the public, and as between them must depend upon the actual fact. I have not referred to the orders for possession obtained in five of the cases, as in the view I take of the case, they are not material. I base my judgment wholly upon the agreement for the new tenancy being subsequent in date to the service of the summons; and I leave undetermined the question whether, if the agreement had been prior to either summons or demand of possession or other dissent by the landlord, the title of the claimant to the franchise would not be valid.

FITZ GIBBON, L. J.:—

There is one thing which, through all differences of opinion, has been held essential to the franchise, when the claimant's interest in the qualifying premises is not that of an "owner," namely, occupation "*as tenant.*" The character of the tenancy does not matter: the crucial thing is the fact of occupation as tenant. The lowest form of tenancy is tenancy on sufferance; and I take it as the *minimum* requisite for the franchise. Tenancy on sufferance is thus defined by Woodfall (p. 230):—"A tenant on sufferance is one who has entered by lawful demise or title, and after that has ceased, wrongfully continues in possession, without the assent or dissent of the person next entitled." This definition excludes a person who wrongfully continues in possession notwithstanding the dissent of the person entitled. The summons for possession served on each of these claimants was at least a formal declaration of such dissent; it made their possession thenceforth wrongful, and turned them from tenants into trespassers. The case states that these persons continued in possession after the summons, and therefore after the expiration of the tenancy, for a period which was in each case substantial—that is, during a substantial portion of the qualifying year each of these persons did not occupy as tenant, and, therefore, in my opinion, did not qualify for the franchise.

The only question that remains is whether the parties can, by

Appeal. 1893. HOLLAND v. CHAMBERS. Fitz Gibbon, L. J.

a subsequent contract between themselves, alter the character of the occupation that is past beyond recall. I cannot conceive anything more impolitic than that such a power of affecting public rights should be given to individuals, and it would lead to strange consequences. If transactions between landlord and tenant are to alter the character of antecedent occupation, for the purposes of the parliamentary franchise, see the results. If a trespasser can be retrospectively made a tenant by a settlement made during the qualifying period, will the same result follow if the settlement is postponed until after the qualifying period? If not, the landlord can give or withhold the franchise by accelerating the settlement or by postponing it, and, at all events, a person who is not recognized as tenant until after the Revising Sessions, will be out of the franchise. All these difficulties are avoided if we give their natural meaning to the words of the statute, and insist on seeing that the essential condition of the franchise has existed in fact, *de die in diem*, throughout the whole qualifying period.

For these reasons, I am of opinion that a demand or summons for possession made or served by a landlord on a tenant at sufferance during the qualifying year puts an end to "occupation as tenant"; and though the occupier continues in possession and is afterwards taken back as tenant, by agreement, this cannot give to his previous wrongful possession that character of occupation "as tenant" which is required by the Franchise Acts.

It is right to say that this case does not raise the question, which remains for consideration, as to the effect of a statutory "re-instatement" under the Land Acts.

BARRY, L. J.:—

This decision is not to be taken to affect cases where there is re-instatement under the statute. I do not think it necessary to express dissent, but I incline to the opinion that where there is a possession left to the tenant it is competent for the landlord and tenant to waive all that has taken place—service of the notice to quit and everything else—at all events, down to judgment in ejectment and absolute ouster. For many years in this country the phrase, "waiver of notice to quit," was perfectly familiar; and

certainly the lawyers of this country always acted on the idea that a notice to quit might be waived, and that when it was waived the tenant was restored to his former position. I have always dissented from the decision in *Tayleur* v. *Wildin* (1); and our decision in this case must not be thought to have adopted it. Though, as I have said, the inclination of my opinion leans towards the view that every step short of judgment, if not of actual ouster, taken by the landlord may be waived, still I shall not press that view to the extent of dissenting from the judgment of the Court.

Solicitor for the appellant: *Miller.*
Solicitor for the respondents: *O'Doherty.*

G. Y. D.

KIRKPATRICK *v.* BEGGAN (2).
SAME *v.* MAGUIRE.
CHARLTON *v.* DOLAN.
SAME *v.* GILROY.
SAME *v.* GALLAGHER.
SAME *v.* FEELY.

Parliamentary franchise—Occupation as tenant—Service of eviction notice—Expiration of six months—Demand of possession—Summons for possession—Continuance in occupation without redeeming or paying rent—Re-instatement—Land Law, Ireland, Act, 1887, *s.* 7.

The right to the franchise of tenants otherwise qualified, on whom eviction notices, under the 7th section of the Land Law, Ireland, Act, 1887, have been served, is preserved by the saving clause in that section, where, during the qualifying period, there has been no demand of possession made, summons for possession issued and served, nor any other step taken signifying dissent to the voters' occupation as statutory caretakers after the expiration of the eviction notice.

(1) L. R. 3 Ex. 303.

(2) Before SIR PETER O'BRIEN, C.J., PALLES, C.B., and FITZ GIBBON and BARRY, L.JJ.

Appeal. 1893. KIRKPATRICK v. BEGGAN.

APPEALS by the objectors against several decisions of the Revising Barristers, Messrs. Kehoe and Todd, in the county of Fermanagh, by which the several respondents were declared entitled to the franchise.

In each of the cases the respondent had been, during the whole qualifying period in the actual occupation of qualifying premises, and was the tenant of the same down to the service on him of an eviction notice under section 7 of the Land Law (Ireland) Act, 1887, in execution of a decree obtained by the landlord in ejectment for non-payment of rent. In each case the period of six months from the service of this notice had expired on a day within the qualifying period, without the tenant having paid the rent due or redeemed. In none of the cases was the respondent removed out of possession of the dwelling-house or farm, or in any way disturbed in the same.

In *Beggan's Case*, the only thing done in prosecution of the ejectment decree was the service of the said notice, and the respondent had remained in possession after the six months had expired, without redeeming, but without any demand of possession being made till the date of the hearing before the Revising Barrister.

In *Maguire's Case* and in *Dolan's Case* there was nothing more than the service of the notice, and the expiration of the six months without redemption; but subsequently, and before any demand of possession was made, the respondent had been re-instated as tenant on payment of the rent and costs mentioned in the notice.

In *Gilroy's Case* the respondent was a sub-tenant on the farm of a man called Sheeran, whose name appeared in a schedule of persons in like case with the respondent in *Dolan's Case*.

In *Gallagher's Case* there was a demand of possession made after the expiration of the eviction notice, but not until after the end of the qualifying period; and Gallagher had been since re-instated in his holding.

In *Feely's Case*, during the qualifying period, there was a demand of possession made, and a summons was issued to recover possession at Petty Sessions. Pending the hearing of the

summons a settlement was made, and Feely was re-instated in his holding.

Ross, Q.C., Cleary, Q.C., and *Dane*, for the appellants.

Sullivan, Q.C., Healy, and *M. J. Kenny*, for the respondents.

Cur. adv. vult.

SIR PETER O'BRIEN, C.J. :—

Dec. 14.

These several cases may be dealt with together for the purposes of our judgment. They necessitate a consideration of the provisions and effect of section 7 of the Land Law (Ireland) Act, 1887. That section provides that upon the service of the notice therein mentioned, the tenancy in the holding shall be determined as if a writ of possession under the judgment had been duly executed. [His Lordship read the last clause of section 7, sub-section 3.] Now, in some of the cases before us there was, with the exception of re-instatement, which is common to all the cases except *Beggan's Case*, nothing more than the expiry of the time within which a writ of restitution might have been applied for. In others there was also a demand of possession. In one there was a summons as well as a demand of possession, while in all except, as I have said, *Beggan's Case*, there was a re-instatement of the tenancy in the holding.

We have decided at the present sittings by a majority of the present Court, my Lord Chief Baron dissenting, that where there has been an eviction notice, expiry of the time for redemption, a demand of possession, and a summons, the claimant is not entitled to the franchise. This was decided in *Holland* v. *Graham* (1). Lords Justices Fitz Gibbon and Barry, with whom I concurred, decided against the vote. A question arose as to whether, upon the mere expiration of the time limited for redemption the vote was lost, whether that circumstance alone deprived of its preservative efficacy the last clause of sub-sect. 3, which enacts that a right to be registered as a voter shall not be affected by reason *only* of the service of the notice. I was at first inclined to think that the mere expiration of the time deprived that clause of what I have designated its preservative efficacy, but on consideration I came to the conclusion that is not

(1) *Ante*, p. 434.

Appeal. 1893. KIRKPATRICK v. BEGGAN. Sir P. O'Brien, C.J.

so; for the break in the tenancy and occupation, which would have arisen by the judgment being deemed to be executed, was prevented by that clause, and the caretakership, which arose on the service of the notice, was independent of the expiry of the mere time of redemption. It is not affected by it, and it might be determined before its expiry, or continue after its expiry until so determined. But what were the operative effective circumstances in *Holland* v. *Graham* (1)? The demand of possession, and the summons; or rather, I should say, either of them; because either demand of possession or summons was, in my opinion, equally efficacious to determine the caretakership—to convert a man who was a mere permissive occupant into a trespasser. Once there was a demand of possession, the caretaker became a trespasser. True, the possession, so as to support an ejectment, was already in the landlord; but a demand of possession put an end to any *permissive* occupancy that existed, and after that the man who was in, by virtue of caretakership or permission, became a trespasser. Now, this was the ground of our decision in *Holland's Case* (1). The question of re-instatement did not arise in it; but does this circumstance alter the matter? The 3rd sub-section of section 7 provides that the landlord may, *if he so thinks fit*, after such period has elapsed, re-instate such tenant in the tenancy of his holding in as full and ample a manner as he previously thereto enjoyed it. No doubt, as between landlord and tenant, for the purposes of the Land Law (Ireland) Acts, 1881 and 1887, there may be, on re-instatement, a continuance of the tenancy effected. The old tenancy may be revived, and an unbroken relation of landlord and tenant in one tenancy deemed to exist, as between landlord and tenant, so as not to affect rights arising out of the old tenancy. But in my judgment this view cannot prevail when we come to deal with the franchise.

In my opinion, once there is, after the time limited for redemption has expired, a positive act by the landlord, disaffirming the permissive occupancy or *status* of caretakership, a permissive occupant becomes a trespasser, and thereupon arises a disqualifying break in the occupation as tenant or caretaker. The words of the

(1) *Ante*, p. 434.

Act are, "who shall on the 20th of July in any year, and *during the whole of the qualifying period* occupy as owner or tenant." Once a man becomes a trespasser he does not fulfil the conditions of the Acts of Parliament—of the Franchise Acts. The question under the Franchise Acts is not one between landlord and tenant. It is one between the occupier and the public, and in the public interest the statutes require occupation as tenant. We decided yesterday unanimously, in *Devine's Case* (1), that on a man becoming a trespasser for any substantial period of time during the qualifying period, though there is afterwards a transaction which may prevent and estop the landlord from denying that during the whole of the qualifying period the claimant was tenant, nevertheless he may not be entitled to the franchise. The franchise depends on the words of the statute I referred to, and being a question not as between landlord and tenant, but between the claimant and the public, there is, in my opinion, having regard to our decision in *Holland* v. *Graham* (2), no substantial distinction between that case of yesterday, and the cases of to-day. We decided in *Holland* v. *Graham* (2), that once there was in the case of an eviction notice a demand of possession after the time limited for redemption expired, the franchise was lost; and we decided yesterday that an agreement which, as between landlord and tenant, had the effect of creating a tenancy by relation back, did not wipe out the blot of being once a trespasser. Certainly, neither in the case of yesterday, nor in *Holland* v. *Graham* (2), was there re-instatement. But if we held that the landlord, by re-instating the tenant in the tenancy could alter the case, we would be driven to the length of deciding that the franchise may be at the beck and call of an individual, and that even in the case of the franchise, and for the purposes of the franchise, he may in substance convert a trespasser into a tenant, and remove by something *ex post facto* the disqualification arising from the fact of a man having become a trespasser, and not satisfying the requirements of the Act of Parliament, which says he is, in order to get the franchise, to occupy as tenant during the whole qualifying period. This, in my judgment, cannot be. I am

(1) *Ante*, p. 442. (2) *Ante*, p. 434.

Appeal. 1893. KIRKPATRICK v. BEGGAN. Sir P. O'Brien, C.J.

accordingly of opinion that, in whichever case there was a demand of possession and a summons, or either one or the other, the Revising Barrister must be reversed, and the vote disallowed, but that where there was neither demand of possession nor summons, the claim to the franchise has been established, and the decision below must be affirmed.

PALLES, C.B., concurred, stating that he was bound by the decision of the Court in *Holland* v. *Graham* (1).

FITZ GIBBON, L.J.:—

That the *status* of a tenant of some sort is essential to the franchise in all these cases I believe we are agreed. The point of difference was upon the question whether the *status* of tenant for the purpose of the franchise is gone as soon as anything more has been done to disaffirm or determine the right of occupation, after service of an eviction notice under the Land Law (Ireland) Act, 1887, sect. 7. If I could see that the *status* of tenant, even at sufferance, continues after a demand of possession, or if I could see that, when a tenant is "re-instated," his *status* relates back as if it had never been disturbed, in either case I should hold that the franchise was not lost. But my construction of the Act is this:—1, The *status* of tenant is expressly destroyed by the service of the eviction notice, though *service only* of the notice does not affect the franchise, *i. e.* the statutory caretaker remains entitled to the franchise, as if he were still tenant, until something more is done; but when anything more is added to the service of the notice, by way of ending or disaffirming the caretaker's right to occupy, his *status* as tenant being already gone, the last saving clause of section 7, subsection 3, no longer preserves his franchise;—2, Re-instatement, when it takes place, gives back all the rights in the tenancy which existed before the service of the notice; but, if in the meantime the franchise has been lost, the re-instatement cannot attach, by relation, to a past wrongful occupation, or to a *status* which was not that of a tenant, that character of occupation "as tenant" which the

(1) *Ante*, p. 434.

Franchise Acts require to exist continuously throughout the whole qualifying period.

In *Devine's Case* (1) the holding did not come within the Land Law (Ireland) Acts, 1881 and 1887. A notice to quit was served by the landlord. It expired. It was followed by a demand of possession, and service of a summons to attend before the magistrates, but no action was taken on the summons. We held that a tenancy of some kind was essential to give the occupation a qualifying character, but that even the lowest form of tenancy—tenancy on sufferance—could not exist when there was actual dissent on the part of the landowner, and, therefore, that on the demand of possession, and service of the summons, the occupation of the tenant on sufferance was converted into the occupation of a trespasser, and ceased to have the qualifying character. But *Devine's Case*(1) went farther towards deciding the cases now before us; for, after the tenant had been converted into a trespasser, a new agreement was entered into by him and the landowner, by which, without any disturbance of his actual possession, he was re-accepted as tenant, and he contracted to pay, and he actually did pay, rent at the old rate for the very period during which he had been in occupation as a trespasser. The Revising Barrister held that by this agreement the occupation was clothed, for the purpose of the franchise, with the essential qualifying character of tenancy by relation and *ab initio*, as it were, covering the time before the new contract of tenancy was made, but this Court unanimously held the contrary, and disallowed the vote, on the principle that, though the parties by agreement might create a tenancy which, as between themselves, might relate back to the moment when the former tenancy had ceased, they could not alter the character of the occupation which had taken place in the interval, so as to create *ex post facto* a right to the Parliamentary franchise.

Larkin v. *Clarke* (2) was a case of ejectment for non-payment of rent. The sheriff attended. The tenant was formally put out, but was at once re-admitted as a caretaker, pending redemption. In that case we held that there was a break in the *status* of the tenant and a change of possession, and although the tenant

(1) *Ante*, p. 442. (2) Lawson, Notes, 1886–87, p. 37.

Appeal. 1893. KIRKPATRICK v. BEGGAN. FitzGibbon, L.J.

was only out of possession for a moment or two, and was at once re-admitted, we held that this form was gone through with the intention of substantially affecting both the title and the possession, and that there was an interval, however short, during which the possession and the occupation were in the landlord, and, therefore, that the qualifying occupation of the tenant was broken, and his vote was gone.

This year the present Court, the Lord Chief Baron dissenting, decided *Holland's Case* (1) upon grounds that seem to me to rule those now under consideration. Holland's holding was within the Land Acts. He was served under the Act of 1887, sect. 7, with an eviction notice, which had expired. There had been a demand of possession, and a summons had been served, but there had been no actual disturbance of the possession, and no re-instatement. We held that when the eviction notice had expired, and had been followed by a demand of possession and the service of a summons, the franchise was no longer protected by the saving clause of sect. 7, sub-sect. 3, which prevents "service only of the notice" from affecting the rights of registration or of voting.

I think these authorities, all of which bind us, leave nothing open now except the simple question of the effect of re-instatement under the Land Law Acts:—Can re-instatement, in the case of holdings and tenants within those Acts, confer a right to the franchise which we held not to be conferred by the agreements and acts of the parties in *Devine's Case* (2)? I see no ground for such a distinction; but as the question has come up again, and is important, I should like to state the principle which seems to me to underlie the several Acts dealing with the matter, both as to re-instatement, and as to the saving clause referring to the franchise.

I think we can best understand the effect of the Act of 1887 by seeing what the law is independently of that statute, and what are the steps of the regular process of recovery of actual possession by a landlord, in place of which the alternative process of eviction by notice may be substituted under the Act of 1887, sect. 7.

This section affords one more instance of the modern form of legislation, which has led to so much difficulty in interpreting the

(1) *Ante*, p. 434. (2) *Ante*, p. 442.

Land Acts. It is enacted that people and things shall be deemed to be what they are not, for the purpose of attributing to them rights and incidents which they would not otherwise possess. The only way to get at the effect of such legislation is to do what we are bid, try to see what the rights would be in the case of a real tenant really evicted, and then attribute those rights to the man who has been put through the statutory performance which is to be deemed to be equivalent to the regular process.

There are two things in ejectment for non-payment of rent which must be kept distinct—eviction and the right of redemption. The proceedings are independent. Eviction may or may not be followed by redemption, eviction may be postponed until the period of redemption has expired, or the eviction may be effected, and redemption and restitution may be enforced against the landlord after the tenant has been put out. We have to see how the new procedure under the Act of 1887, sect. 7, corresponds to the former process at each step.

The Act of 1860, 23 & 24 Vict. c. 154, sect. 70, provides that if the defendant in an ejectment for non-payment of rent suffers a decree to be executed putting the landlord into possession, without paying the rent and costs, within six months after execution, and also making application to be restored to the possession, he shall be debarred from restitution, and the landlord shall thenceforth hold the premises discharged from the tenancy.

The same Act (sect. 71) enables the tenant, or any other person having a specific interest in the tenancy, within six months, and after payment of the rent and costs, to obtain restitution.

If a tenant is so evicted, and having been formally put out, is afterwards restored on application duly made within the six months, the tenancy is completely restored, at law and in equity, with all its rights and obligations. But, nevertheless, it is beyond question that the tenant in that case would have lost the franchise, because he was out of occupation during part of the qualifying period.

The Land Act of 1881, sect. 20, sub-sect. 2, has an important bearing on the same matter. It says:—"When the landlord has resumed possession of a tenancy from a present tenant, he may, if he thinks fit so to do, re-instate such tenant in his holding as a

Appeal. 1893. KIRKPATRICK v. BEGGAN. Fitz Gibbon, L. J.

present tenant; and thereupon such tenancy shall again become subject to all the provisions of this Act which are applicable to present tenancies." That provision is not confined to cases of eviction for non-payment of rent; it applies to all cases of resumption from "a present tenant"; and if the landlord puts the tenant back, after having had the possession in his own hands, he thereby confers upon him the *status* of a present tenant; that is to say, he gives him a tenancy that relates back to the passing of the Act of 1881, or was created before January 1, 1883. Thus, by statute, the tenancy "again becomes" a tenancy covering, by relation back, a period during which the landlord had the possession. But nevertheless, in that case also, if the landlord had the possession during part of the qualifying period, the re-instated tenant would not have the franchise. This sub-section includes cases of eviction on the title or for breach of condition; it does not limit the period during which the landlord, "if he thinks fit," may "re-instate" the tenant; and no one has ever suggested that re-instatement under this section of the Act of 1881 would restore the tenant's right to the franchise in respect of a period during which the landlord had the possession, and the tenant was not in occupation at all.

Now I come to the Act of 1887, and I try the effect upon the franchise of the steps permitted by that Act, by seeing the effect of the real steps to which they are to be deemed to be equivalent.

First comes the service of the eviction notice in the prescribed form:—"Upon such service the tenancy shall be determined *as if a writ of possession under the judgment had been duly executed.*" By these words we are thrown back to the Act of 1860; and if the tenant was put out by execution, no matter for how short a time, it has been decided that his franchise would be gone. On the distinct language of the Act of 1887, sect. 7, sub-sect. 1, he must be treated "as if" he had been so put out by the service of the eviction notice, and his franchise must equally be gone, unless it is preserved by the subsequent saving clause, or restored by re-instatement.

The next step is to be found in sub-section 2, which enacts that "upon the determination of the tenancy by the service of such

notice, every person upon whom such notice is served shall be deemed to be a person put into possession as a caretaker; and . . . the . . . Act of 1860 . . . shall apply *as if* on the date of the service of the notice a writ of possession had been duly executed, and *such person, having been removed from possession, had been re-admitted as caretaker.*" Here, again, it has been decided that if this process had actually taken place, the franchise would be gone. But the Act of 1887 goes on:—"When a person is deemed to have been put into possession of land as a caretaker under this section he may be removed from possession at any time after one month from the service of such notice . . . in the manner provided by law for the recovery of possession of premises occupied by a caretaker." If the landlord, after the month, puts him out, he may obtain restitution and come back again, under sub-sect. 3, on complying with the provisions of the Act of 1860; but such restitution, as we have seen, will not restore the franchise. But sub-sect. 3 also provides that, "at the end of the period of six months from the service of the notice determining the tenancy all right of redemption in the holding shall be at an end." That is the only provision in the Act which expressly gives effect to the mere expiration of the notice; it puts an end to the right of redemption, and the period of the six months' notice, therefore, is merely the measure of the period of redemption under the Act of 1860, and that period being necessarily a period during which the tenant has been out of possession, cannot co-exist with the occupation "as tenant" which is essential to the franchise. Therefore, again, I say, the franchise is gone unless the saving clause preserves, or the re-instatement clause restores it.

Then comes the re-instatement clause:—"Provided that the landlord may, nevertheless, if he so think fit, *after such period has elapsed, re-instate such tenant in the tenancy of his holding in as full and ample a manner as he had previously thereto enjoyed it.*" I cannot read these words in any different sense, or give them any different effect, from the sense and effect of the similar words in the Act of 1881, sect. 20, sub-sect. 2. Both sections seem to me to be *in pari materia* with the redemption sections of the Act of 1860; the word "re-instate" occurs in both; "again become," in

Appeal. 1893.

KIRKPATRICK *v.* BEGGAN.

Fitz Gibbon, L.J.

the Act of 1881, and "had previously enjoyed," in the Act of 1887, equally point to the giving back of something that had been for a time lost, and I cannot give to either enactment the same effect which those who framed the Acts might easily have expressed if they had so meant, by the words, "on re-instatement the tenant shall be deemed never to have been put out at all." Finding that a tenant who redeemed under the Act of 1860, and a "present tenant" who was re-instated under the Act of 1885, would equally have lost the franchise by a breach in the occupation, I hold that a tenant re-instated under the Act of 1887 is in the same position.

The last clause to be considered is the saving clause, sect. 7, sub-sect. 3:—"A right to be registered as a voter, or to vote at any parliamentary or other election shall not be affected by reason *only* of the service of a notice or notices under this section." The effect of this clause has been decided in *Holland's Case* (1). The difference of opinion between the Lord Chief Baron and the other members of the Court appears to turn on the effect to be given to the word "only." I do not know what effect the judgment of the Lord Chief Baron gives to the word "only," unless it is to mean that actual taking of possession by the landlord, and that alone, shall affect the right of the tenant to be re-instated or to vote. Such a construction reverses the natural meaning. I think the word "only" limits the saving to the cases in which there has been no disaffirmance or disturbance of the statutory caretaker's right of occupation, further or other than the service of the eviction notice. The supposed removal from possession as tenant, and re-admission as caretaker, and determination of the right of redemption by expiry of the notice, will not affect the franchise, because all these are to be deemed to have occurred "by reason only of the service of the notice." That, and that only, is, in my opinion, the extent of the saving.

But if, after these things had actually occurred, the landlord demanded possession from a real caretaker, his occupation would thereby become wrongful—he would thenceforth be no longer a tenant at sufferance—he would be a trespasser. The service of a

(1) *Ante*, p. 434.

summons, or any analogous proceeding, must, in my opinion, necessarily be at least as potent on the *status* of the statutory caretaker, as the same step would be on the *status* of a real caretaker, and by decisions of this Court, binding on us, it has been held that in such cases the franchise does not exist. I think the true effect of the saving clause is nothing more than this: It preserves the character of a qualifying occupation "as tenant" for the occupation which has been turned, by service of the notice, into that of a statutory caretaker; so long as nothing more is done, the right to the vote is not affected; but when the occupation is made wrongful by a demand for possession, or by any other lawful disaffirmance of the caretaker's right to remain, his *status*, even as a caretaker, is gone, and the qualification for the franchise is gone with it.

Applying these principles to the several cases, the result in each is easily seen.

In *Gilroy's Case* the notice was served, but nothing more happened except its expiration. Gilroy was only a sub-tenant. After the expiration of the six months the middleman paid up the rent, and was re-instated by the landlord. Neither Gilroy nor the middleman was disturbed in his actual occupation. There was no demand of possession; no expressed dissent to Gilroy's remaining in possession; and therefore, as the undisturbed sub-tenant of an undisturbed and re-instated middleman, Gilroy's right to his vote is unaffected.

In *Gallagher's Case* there was a demand of possession after the expiration of the eviction notice, but not until after the end of the qualifying period. The principle on which this Court has always acted is that the qualifying occupation must continue unbroken *de die in diem*, throughout the qualifying period; but we can go no farther. Gallagher had an undisturbed and qualifying occupation down to the demand of possession, which was not made until after the qualifying period was complete. He is, therefore, entitled to the franchise.

Dolan's Case includes Gilroy's middleman; there was no disturbance, and, for the reasons already given, he also is entitled to the franchise.

Appeal.
1893.
KIRKPATRICK v. BEGGAN.
Fitz Gibbon, L. J.

In *Feely's Case* there was a demand of possession and service of a summons within the qualifying period, and therefore the vote is lost.

In *Maguire's Case* and in *Beggan's Case* there was no demand of possession, nor any other step signifying dissent to the continuance of the claimants' occupation as statutory caretakers after the expiration of the eviction notice, and therefore the votes are preserved by the saving clause.

BARRY, L. J., concurred.

Solicitor for Kirkpatrick: *A. J. Dudgeon.*
Solicitor for Charlton: *C. F. Falls.*
Solicitor for the respondents: *Murphy.*

G. Y. D.

M'CORMICK, TENANT; LOFTUS, LANDLORD (1).

Appeal.
1893.
Dec. 19.

Land Law (Ireland) Act, 1881, *s.* 58—*Holding let to be used mainly for the purpose of pasture—Ancient pasture—User and character of the holding—Lease silent as to purpose.*

Lands were demised to the tenant in 1871 by a lease which was silent as to the purpose of the letting, and contained no restrictive covenants, except that the lessee would not alien or build cabins on the holding without the lessor's consent. Owing to its user prior to the date of the lease the greater part of the holding was, at the date of the lease, ancient pasture. Since the date of the lease no portion of the lands had been tilled by the tenant. The lands were situated in a grazing district, and were not equipped for tillage, having only a herd's house, and no other buildings. Evidence was given that a considerable portion of the lands was capable of being tilled, but that pasture would be the more profitable user:—

Held, that the letting was made mainly for the purpose of pasture.

APPEAL by the tenant against an order of the Land Commission dismissing his originating notice to fix a fair rent of his holding.

The lands of Ballyragget, in county Westmeath, containing 413A. 1R. 26P. statute measure, were by lease, dated 1st June, 1871, demised to the tenant to hold for two lives or thirty-one years, whichever should longest last, at the rent of £536 1*s.* 9*d.* The valuation of the holding exceeded £50.

The acreage of the lands was given in the lease as 255 acres 35 perches Irish plantation measure. The lease gave the usual powers of entry and distress to the lessor. It contained covenants on the lessee's part to pay the rent, keep and yield up in repair, against alienation without the lessor's consent; an undertaking not to erect any cabin or cabins on the premises without like consent, and a covenant by the lessor for quiet enjoyment. It contained no other covenants or provisions.

The Court Valuer's report stated that the only building on the land was a herd's thatched house; that the holding was seven

(1) Before WALKER, C., PALLES, C.B., and FITZ GIBBON, L.J.

Appeal. 1893. M'CORMICK, *Tenant;* LOFTUS, *Landlord.*

statute miles from Mullingar; and thus described the character of the holding:—"This is all a grazing-farm, and evidently used for a long time as such. About one-half may be classed as good fattening land, and one-half as high-class store-land. It is all a limestone soil, and some of the fields have the rocks coming to the surface. There are also light gravel hillocks, and the land is rather uneven in the depth of its soil; but the best of its parts have a deep and superior clay."

The report of the Lay Assistant Commissioners stated that 377 acres 2 roods of the holding were second-class fattening land, that 28 acres were third-class store pasture, that 5 acres were second-class tillage (medium soil), and that 1 acre 2 roods was waste, the total acreage being 412 statute acres. It gave the carrying power of the farm as 130 "sums," the grazing continuing all the year, and the farm providing hay for the winterage. It set out that at the date of inspection there were 2 acres under oats, 2 acres under temporary grass, 1 acre under potatoes: all these crops being grown by the herd, and no rotation being observed. The report added that the holding was "suitably used as a feeding farm," that it was "well watered, aspect good, elevation 300 to 400 feet; surface undulates considerably, rising up into knolls and hillocks, frequently steep; and with soil or herbage much inferior to the valleys between them. These are so interspersed among the good land that they could not be fenced off, and without an actual survey could not be delineated on map, and are marked on map a^2 (*i. e.* second-class fattening land), though not properly feeding land."

The evidence produced on behalf of the tenant showed that a considerable portion of the farm—nearly one-half—though more suited for pasture, was of such a nature that it could be tilled, and that most of the remainder could be profitably meadowed, if top-dressed, though this would not be its most suitable user, and the proper course would be to keep the meadowing for the winter feeding of the cattle. The farm was divided into four or five large fields, one of which was half the size of the entire holding. Rocks which would interfere with tillage cropped out in all the fields. The land was situated in a grazing district. There had been some cottages on the farm besides the herd's house, but the tenant's

father, in whose possession the lands were down till his death in 1848, had removed them. After his father's death the lands came into the possession of the tenant's brother, who held them till the tenant took them.

From 1840 to 1850 about 20 acres, Irish, were tilled in each year. From 1850 to 1858 not more than 14 acres, Irish, were tilled in any one year. From 1858 down to 1871 no part of the lands were tilled. From the date of the lease to the present time the tenant had not tilled any portion of the holding.

Campbell, Q.C., for the appellant.

Matheson, Q.C., and *Cherry*, for the respondent.

WALKER, C.:—

We do not think it necessary to call upon counsel for the landlord. This is a stronger case than most of those which have come before this Court in which the question to be decided has been whether the holding was let to be used mainly for the purposes of pasture? It is well settled that whenever this question arises two matters have to be considered—first, the terms of the letting; and, secondly, the purpose of the letting; and, in considering what is the purpose of any particular letting, we must also bear in mind that the purpose may be implied as well as expressed; and where the document constituting the letting is silent as to the purpose we can look for evidence of that purpose *dehors* the document.

In this case for the thirteen years next preceding the making of the lease in 1871 no portion of the holding was tilled. During the seven years preceding 1858 the largest amount tilled in any one year was 14 acres (Irish). Thus during the twenty years preceding the lease the maximum number of acres broken up was 98 out of a farm consisting of 255. Accordingly we have at the date of the lease a portion of the demise, consisting of at least 150 acres stamped with the character of ancient pasture. There is an implied obligation on the tenant that he will not break up this portion; and if he attempts to break it up he can be restraind by injunction. It is true that the fact that an injunction can be obtained need not necessarily be present in a case of this kind to

Appeal. 1893. M'CORMICK, *Tenant;* LOFTUS, *Landlord.* Walker, C.

prove that a holding is let as a pasture holding; still, where such an injunction can be obtained as to so large a portion of the subject-matter of the demise, it furnishes strong evidence in aid of the other circumstances that exist. Mr. Campbell has argued that the principle of *Murphy* v. *Daly* (1) would not apply to a letting made since 1870. But I can see nothing in the Act of 1870 to prevent its applying, if there is nothing in the lease about breaking up the land.

It is clearly laid down in *Westropp* v. *Elliyott* (1) that foremost amongst the matters furnishing evidence of purpose *dehors* the agreement we are to look to the character and user of the land. All the circumstances here seem to imply that the purpose of the letting was for pasture. The father of the last tenant levelled all the cottiers' houses, leaving only the herd's house. In character the land is capable of being tilled, but it does not therefore follow that it was in the contemplation of the parties that it should be tilled. The user, in fact, would negative any such idea, for no part of the holding has been broken up during the lease. Scattered in every field there are to be found rocks which is consistent with the holding being profitably used for pasture but not for tillage. The meadowing that was proved is not inconsistent with its being a pasture letting; for there was no meadowing except for winter feeding. On the whole, I have come to the conclusion that the holding was both equipped as a pasture holding and used as such. It has a herd's house, and no other buildings; it is situated in a grazing district; in character as well as in use it is a grass farm; and it is impossible to resist the conclusion that it was so meant to be used by the parties; in other words, that such was the purpose of the letting.

PALLES, C. B.:—

The farm consists of 255 acres, Irish plantation measure. From 1858 to the present time all of it has been kept continuously in grass, and used exclusively for pasture. In each year prior to 1858 a small portion was broken up. The exact amount of tillage in each year does not clearly appear; but, taking the *maximum*,

(1) 13 Ir. C. L. R. 239. (2) 9 App. Cas. 815.

it is impossible to hold that the total amount which was broken up from 1851 to 1857, inclusive, exceeded 98 acres (Irish). Thus, at the date of the lease in 1871, out of the 255 acres comprised therein, at least 150 acres had not been broken up during the immediately preceding twenty years, but during all that period had been used for pasture. *Murphy* v. *Daly* (1), a decision of the Exchequer Chamber, shows that this portion of the farm constituted at the date of the lease ancient pasture. If the lease had contained a covenant that these 150 acres should be used exclusively for pasture the holding would, in my opinion, have been let to have been used *mainly* for the purpose of pasture, within 44 & 45 Vict. c. 49, sect. 58, sub-sect. 3. Whilst, however, there is no express covenant to this effect, there are, upon every such letting, implied covenants not to commit waste, and to use the lands in a husbandlike manner; and, as it would be unhusbandlike conduct, and waste at common law, to use ancient pasture otherwise than as pasture, there was an implied covenant that the 150 acres should be so used; and were there nothing more in the case, I should, for that reason alone, hold that the farm was "let to be used mainly for the purpose of pasture."

Mr. Campbell has argued that the fact of lands being ancient pasture is not conclusive, and in support of his argument has relied upon that circumstance not having been made the *ratio decidendi* of the judgment of the Land Commission in *Eivers* v. *Hamilton* (2). This, however, is explained by the evidence there being held by the Land Commission, and, as I think, rightly held, to be insufficient to prove that the lands comprised in the letting under consideration there were ancient pasture. This is expressly stated to be the ground upon which that element was excluded there. "The evidence," says Bewley, J., "is perhaps insufficient to establish that the lands were ancient pasture when the lease was made." The dates show that this conclusion was correct. The lease in that case was dated the 10th June, 1849. Twenty years from that date would go back to the year 1829, and the evidence of the oldest witness examined appears not to have extended further back than 1833.

(1) 13 Ir. C. L. R. 239. (2) 28 L. R. Ir. 464.

Appeal. 1893.

M'CORMICK, *Tenant;* LOFTUS, *Landlord.*

Palles, C.B.

So far as I am aware, in every case in this Court in which it appeared that lands were ancient pasture, the Court felt itself bound to give effect to that circumstance. I distinctly recollect the matter being mentioned in the case of a farm at Cabra, on which a mansion-house, stated to have been formerly occupied by Lord Norbury, was erected. But it is not alone by the practice of this Court that the question is to be determined. It is, in my view, set at rest by the decision of the House of Lords in *Westropp* v. *Elligott* (1). Lord Watson there states the law in the clearest manner:—"The question," he says, at page 831, "as to the particular use for which a holding was let may, as it appears to me, arise under these different conditions." He then mentioned four different sets of conditions, to two only of which is it necessary that I should refer. "First of all," he proceeds, "the lease may prescribe, in express terms, the use or uses to which the tenant is to be limited. In the second place, even in the absence of express stipulation, there may be an effectual limitation of the tenant's right to one particular use, derivable by implication from the terms of the lease. Whenever the contract fixes, either expressly or *by implication*, the uses which the tenant is to make of his holding, it must, I apprehend, be conclusive as to the purposes for which the holding 'is let to be used.'" The present case falls within the second class mentioned by Lord Watson.

It has been said by Mr. Campbell that the test whether an injunction to restrain the breaking up of the lands would or would not be granted, is not conclusive on the question of the purpose for which the lands were let to be used. This is unquestionably right; but in what sense? It is settled by the House of Lords that the purpose need not necessarily be expressed in the contract, and that, although it is silent as to the purpose, still you may gather the purpose from circumstances, *dehors* it. And what is meant by saying that the right to an injunction is not a true test is this, that although the contract may be silent as to the purpose, and thus in itself does not afford any ground for an injunction, nevertheless the purpose of the letting may be such as to bring the holding within the exception in sect. 58, sub-sect. 3. Thus

(1) 9 App. Cas. 815.

there may be sufficient proof that the purpose of the letting was that the lands should be used mainly for pasture, although the circumstances are not such as would sustain an injunction to prevent its being used for tillage. Where, however, the circumstances are sufficient to sustain an injunction to restrain any use save for pasture, such circumstances *a fortiori* evidence the purpose of the letting sufficiently for the purpose of sect. 58, sub-sect. 3.

It is not, however, necessary to base the decision here on the mere fact that 150 out of the 255 acres must be devoted to pasture, as we cannot leave out of consideration as an element in the case the actual user of the holding. This matter is treated in *Westropp* v. *Elligott* (1) as being a factor of an important character for the Court to consider in cases of this kind, although it is not actually conclusive. The actual user here of the entire holding had during the whole currency of the lease (twenty-two years) been that of pasture, and the user for the thirteen years prior to the lease had been of the same character. A further element also is to be borne in mind —the character of the land. The report furnished by the Land Commission shows that the purpose for which the land is best suited is pasture, whilst the evidence of the witnesses, especially as to the mode in which rocks crop out in the several fields, tends to show that the parties could not have contemplated any profitable user except pasture. Taking all these several elements into consideration they, in my mind, show unanswerably that this holding was let "to be used mainly for the purpose of pasture."

Fitz Gibbon, L.J.:—

The terms of the letting, express or implied, are the dominant consideration in cases of this kind. The purpose must be consistent with them. Here the express terms of the written contract are significant. At the date of the lease the lands were all in grass. The only building upon the holding was a herd's house: it was then, in fact, a typical pasture holding. In this state of facts, observe the force acquired by the prohibition by the lease of the erection of any cabins on the lands. This proves a purpose, in the

(1) 9 App. Cas. 815.

Appeal. 1893.

M'Cormick, *Tenant:* Loftus, *Landlord.*

Fitz Gibbon, L. J.

minds of both parties, that there should be no resident labourers on this large tract, and shows that the herd's house was understood to afford sufficient accommodation, so far as residence was concerned, for working the holding in the manner in which it was intended to be worked. This covenant, with the omission of all husbandry covenants, strengthens powerfully the conclusion that, at the date of the lease, both parties purposed that the implied contract not to break up the ancient pasture was to have its full effect. Thus the terms of the letting, express and implied, afford persuasive evidence that the holding was let mainly for the purpose of pasture.

Even apart from the question of ancient pasture, the user and character of the lands afford no less cogent evidence of the same purpose. It would be hard to distinguish the legal result of the facts proved in this case from that attributed by Bewley, J., to similar circumstances in *Eivers* v. *Hamilton* (1), where the learned Judge says :—" The continuous use of the holding, in the present case, as a grazing-farm for upwards of half a century ; the situation of the holding in an essentially grazing district ; the fact that the holding at the date of the letting was only equipped with such buildings as were necessary for a grazing-farm ; and the provisions in the contract of letting practically prohibiting the tenant from erecting any additional buildings, save those that would be found suitable for a grazing-farm, as well as other circumstances of minor importance, lead us irresistibly to the conclusion that it was the intention of the landlord to let, and of the tenant to take, the lands in question wholly or mainly for the purpose of pasture."

But in addition to all this we have the potent if not conclusive element that the larger part of the farm was bound by an implied covenant to treat it as ancient pasture. Possibly, even if this element alone were in the case, it might be enough, but I do not rest my judgment upon it alone, because it is unnecessary, where there are so many other grounds for the same conclusion, and also because I wish to be quite free, if a lease chiefly or largely of ancient pasture land should come before us, containing express

(1) 28 L. R. Ir. 464.

provisions relating to tillage, to consider whether the farm is or is not excluded from the Land Acts. In such a case I am inclined to think, as at present advised, that the question would arise, Whether the tillage contemplated in the lease is more than ancillary to a main purpose of pasture?

Solicitor for the appellant: *Mooney.*

Solicitor for the respondent: *Fetherstonhaugh.*

G. Y. D.

ARCHER, TENANT; EARL OF CALEDON, LANDLORD (1).

Appeal. 1893. Dec. 20.

Landlord and tenant—Land Law (Ireland) Act, 1881—*Town park*—"*Town*"—*Accommodation land*—44 & 45 *Vict. c.* 49, *sect.* 58, *sub-sect.* 2.

Whether a place is a "town," so as to constitute one of the statutory requisites for making a holding in its neighbourhood a "town park," depends on whether it can be fairly described in ordinary language as a "town," and whether there are living in the place people who want land for their own accommodation, and who are willing to pay for it more than its ordinary value.

APPEAL by the landlord from an order of the Land Commission fixing a fair rent on the tenant's holding.

The holding mentioned in the originating notice contained 4A. 3R. 17P. statute measure, and was situated somewhat less than half-a-mile from Caledon. William Archer, the tenant, bought it in 1883, at a public auction, for £60. He lived in Caledon, where he carried on the trade of painter, and where his wife kept a public-house. Archer kept a cow on the holding and sold milk through Caledon. He had at one time kept a horse and car. The previous tenant was Thomas Magill who got possession of the holding in 1873. He was a saddler living in Caledon; he kept two cows on the holding, and sold their milk; he had also cultivated a portion of the holding, using it for corn, potatoes, hay, and grazing. Before Magill's time the holding was in the hands successively of a father

(1) Before WALKER, C., PALLES, C.B., and FITZ GIBBON, L.J.

Appeal. 1893.

ARCHER, *Tenant;* CALEDON, *Landlord.*

and son, John and Charles Wilson. They were general merchants living in Caledon, and the father kept the post-office there; they used this holding in connexion with their house in Caledon. At the date of the hearing in the Court below the population of Caledon was stated to be 703; in 1881 it was 562. Caledon is a petty sessions town, with a weekly market and a monthly fair, and is one of the stations on the Clogher Valley Railway. It was proved that there was a demand by the shopkeepers in Caledon for the adjoining land as accommodation land. The old rent of the holding was £9; the Government valuation was £7 10*s.* The Sub-Commission fixed the fair rent at £7. The report of the Sub-Commission stated that 50 per cent. of this rent was for proximity to Caledon. The landlord had the case reheard by the Land Commission, who affirmed the order of the Sub-Commission, holding that Caledon had not a sufficient population to constitute a "town" within sect. 58, sub-sect. 2 of the Land Law (Ireland) Act, 1881.

The Right Hon. John Atkinson, Q.C., and *Henry*, for the appellant.

A. Todd, for the respondent.

WALKER, C.:—

We do not think it necessary to call upon Mr. Atkinson to reply. The judgment of Mr. Justice Bewley assumes that this holding has every incident of a town park except one. There must be three incidents attaching to a holding to constitute it a town park:—1, occupation by a person living in a town; 2, increased value as accommodation land over that of a farm by reason of being near that place; 3, that the place is a town, that is, it must be an assemblage of houses having the general characteristics answering to what one would understand by that term as used in the Act. The rent here was £9 for an area of 4A. 3R. 17P. The Assistant-Commissioners fixed the fair rent at £7, and 50 per cent. of that rent is put on because the farm is near Caledon. The report of the Sub-Commission says that the increased value is for proximity to Caledon. I think it is an

increased value by reason of the land being used as accommodation land, because the history of the place shows that this is its real nature. During the past forty years it was occupied by three persons, first, Wilson, postmaster and farmer; second, Magill, a saddler; third, Archer, who keeps an hotel, and is also a painter. These were all people living in Caledon, townspeople using the holding at least partly for the purposes of their residences in that place. Mr. Justice Bewley has applied a hard and fast rule—the population test—for the purpose of his decision, that Caledon is not a town. He says that as there were only 562 people in Caledon in 1881, and now 703, therefore it is not a town, and therefore these lands are not town parks; and thus, though the lands are in the occupation of a person living in Caledon, and though they bear an increased value from being near Caledon, and on the evidence there are persons there requiring accommodation lands as Wilson, Magill, and Archer did, and a sufficient assemblage of persons in Caledon to create that increased value, the incident of a town does not exist. The object of the Legislature in excepting town parks from the main provisions of the Act of 1881 was to save lands in the vicinity of towns for the accommodation of townsmen who are willing to pay and do pay an increased value for it.

No doubt we must have something that will present generally the characteristics of a town. But when we have people living in a town and requiring and using accommodation land, and paying 50 per cent. more for their land on account of its being near that place, and those people constitute such an assemblage of persons as is sufficient to create that increased value, and there is an assemblage of houses presenting generally the characteristics of a town, I think all the essential definitions of town parks exist.

I am therefore of opinion that the decision of the Land Commission must be reversed.

PALLES, C.B.:—

I concur in the judgment of the Lord Chancellor, and in the reasoning by which he has arrived at it.

Unquestionably, many years ago there were cases which drew a hard and fast line, as to the number of the population which

Appeal. 1893.

ARCHER, *Tenant:* CALEDON, *Landlord.*

should inhabit an assemblage of buildings which, in ordinary language, would be called a town, in order to constitute such assemblage of buildings a town within the meaning of section 58, and as I read the judgment of Mr. Justice Bewley, he has determined this case upon that principle.

Palles, C.B.

I was under the impression that since the decision in *Killeen* v. *Lambert* (1) these cases were no longer dealt with solely according to the population; but that each case was determined on its own peculiar circumstances. Here, however, the principle that there must be a certain *minimum* population has been applied, and I do not think we can reverse the judgment of Mr. Justice Bewley without laying down that he was wrong in principle in the mode in which he determined that Caledon was not a town. I am of opinion that the learned Judge was wrong. I think it is impossible, having regard to the 58th section of the Act of Parliament, to draw any such hard and fast line. "Town," according to my view, like every other word in the English language, will bear a different signification according to the object with which it finds a place in any particular piece of legislation. We must see whether in this 58th section we can find any mode by which we can with certainty lay down a principle to guide us in determining what is the essence of a town within the meaning of the Act. There are certain statutory exceptions enumerated in the 58th section which are thereby excluded from the provisions of the Act, and I think nearly all of them will be found to be parcels of land, in relation to which there are special circumstances of such a character as to take the tenants of them out of the ordinary class of agricultural and pastoral tenants, for whose benefit the Act was passed. In a number of these exceptions it will be found that these parcels of land are lands which are in the habit of being let for temporary purposes or under exceptional circumstances, which negative any presumption that the duration of the tenancy was, according to the intention of the parties, to be indefinite. Now, according to my view of these town-park cases, where there is a demand for such holdings, so long only as the tenants of them are resident in the town, every such holding is held for the peculiar convenience

(1) 10 L. R. Ir. 362.

of the tenant, as a townsman, and, for that reason, bears an increased value, above its ordinary value, as a farm. Every tenant of course, as a rule, takes his land for his own convenience; but the demand for ordinary farms in the country does not give rise to any fictitious value in land. In such a case there is nothing but the normal value. But the moment you find an *exceptional* number of persons living in a particular area, who, by reason thereof, have special need of small portions of land for their personal convenience, from that moment, if the demand is greater than the amount of land forthcoming to answer it, the land rises in value.

Now, the whole of the Land Act of 1881 appears to me to deal with land in its normal character of land, having no more than its normal value as land; and the reason of the exception out of the Act of land of the description I have mentioned is because it bears a peculiar, as distinguished from its normal, value. I therefore look upon the fact of land having an increased value as accommodation land as one of the elements which will enable us to render certain what otherwise would be uncertain. If, then, we add to that the fact that the person for whom it bears this increased value as accommodation land is a person who is living in a city or town, it will be seen what is the element which must exist in the town to give to that land its increased value as accommodation land. That element is, not that the assemblage of persons within it must be above or below a specified number, but that it must be such as, *in fact*, gives to the surrounding land the increased value I have mentioned.

No doubt, this will throw on the Land Commission the trouble of examining the circumstances of each particular case. I can well understand that in some cases the question will depend not so much on the population or on the size of the particular town as on its shape. Take the case of a long, straggling town, consisting of one street nearly a mile in length, with occasional gaps in the lines of houses, and with large quantities of land at the rere of the houses on each side of the street. I can understand that, although in such a case land would be required for the accommodation of the persons living in the town, the supply of land suitable for that

Appeal. 1893.

ARCHER, *Tenant*; CALEDON, *Landlord.*

Palles, C.B.

purpose might be so ample as not to raise its value above its normal value as a farm.

The test of land bearing an increased value as accommodation land was years ago pointed out in the judgment of Baron Fitz-Gerald in *Christy* v. *Gordon* (1) as the true test for ascertaining whether lands are town parks, and I am glad to take part in bringing back the ground of decision to the rule that was laid down by that distinguished Judge. I cannot help thinking that this is the clearest and most essential element to be sought for when considering whether any particular lands come within this statutory exception. Therefore, my opinion is that where it clearly appears that there is a subject-matter which answers the description of "town" in its ordinary sense, and that the assemblage of houses constituting that town is of such a character that it increases the value of the lands near to or adjoining it, because of their being used as accommodation land by persons residing within the town, the moment that that increased value arises the land becomes a town park within the meaning of section 58; although, for some other purpose, the assemblage of houses might be called a village.

FITZ GIBBON, L.J.:—

I have little to add. It appears from the report of the Sub-Commission that 50 per cent. has been added to the value of this holding by reason of its proximity to Caledon, and such a proportion can scarcely be due to "proximity value" alone, where the town is so small. Ordinary agricultural land near a town may bear an increased value to an agricultural tenant, because it is near a town, without being town parks, and in fixing a fair rent in such a case, "proximity value" properly so called exists. Why? Because there is a market at hand for the produce of the place, and there are advantages as to manure, &c., for its cultivation, and the land is worth more to anybody than if it was at a greater distance from the town. But the enhancement in the value of town parks as accommodation land arises from a different principle, and

(1) 13 Ir. L. T. R. 79.

exists where the value is raised by the fact that there are a number of people dwelling in an assemblage of houses close by, who want land for their accommodation, and by their demand increase its value, as land of a special character, of which the supply is limited, as distinguished from increasing its value as a productive agent. The question here is: Are there people living in this place called Caledon who want land for their own accommodation, and who are willing to pay more than its ordinary value for it? If so, in my opinion, Caledon ought to be regarded as a town to which the statutory exception applies, unless as an assemblage of houses it cannot be fairly described, in ordinary language, as "a town" at all.

The evidence here satisfies me that this holding has always been used for the accommodation of people living in Caledon, and that those people are fairly to be described as "townspeople." The test of population is only one of many; it is not absolute, or even approximately definite. Each case must stand by itself. We put this case on the principle laid down by Baron Fitz Gerald. There are people living in this place who answer the description of "townspeople," who want accommodation land, and this holding bears an increased value, because these people so want it, and these facts afford, in my opinion, strong evidence that the place known as the town of Caledon is a town within the meaning of the Land Act. In other words, the existence of town parks, under such circumstances, goes to show that the neighbouring "assemblage of houses" is a town, and, *vice versa*, the size and character of the "assemblage of houses" goes to show that the neighbouring land bears an additional value as accommodation land.

Solicitors for the appellant: *Longfield, Kelly, & Armstrong.*
Solicitor for the respondent: *M'Ilroy.*

G. Y. D.

Q. B. Div.
1894.
April 24, 30.

JOHNSON *v.* EGAN (1).

(1893. No. 5537.)

Land Law (Ireland) Act, 1887—*Lessee—Present tenant—Subletting—"Application."*

A lessee, whose lease contained no covenant restraining subletting, served an originating notice under sect. 1 of the Land Law (Ireland) Act, 1887, to be deemed a present tenant, and to have a fair rent fixed, and afterwards made a subletting. Subsequently the Land Commission made an order that he be deemed a tenant of a present ordinary tenancy, and fixed a fair rent:—

Held, that the subletting was lawful.

Smith v. *Moore* (32 L. R. Ir. 129) followed.

Semble, that a lessee serving an originating notice, under section 1 of the Land Law (Ireland) Act, 1887, does not acquire the *status* of a present tenant until the hearing by the Court of the application, so as to invalidate a subtenancy created in the interval between the serving of the notice and the hearing.

Motion to set aside verdict and judgment entered for the defendant, and to enter judgment for the plaintiff.

By indenture of lease, dated the 20th November, 1851, Adam Fuller demised to Lawrence Egan the lands of Rockfield and Lisnagarra, in the King's County, for three lives or thirty-one years, at the rent of £124 16*s.* 5*d.* This lease contained no covenant restricting the lessee's right of assignment and subletting. The lessee's interest afterwards became vested in the defendant. One of the lives in the lease is still in being.

On the 19th October, 1887, the defendant duly served an originating notice of an application to the Land Commission in the manner prescribed by the rules under the Land Law (Ireland) Act, 1887, to be deemed a present ordinary tenant from year to year, and to have a fair rent fixed.

On the 21st February, 1888, the defendant, by a parol agreement, let portion of the lands to the plaintiff, at the yearly rent

(1) Before Harrison, Johnson, and Holmes, JJ.

of £13, afterwards reduced to £12. The defendant's landlord was aware of this letting, but gave no consent in writing thereto. The plaintiff remained in possession under the agreement, paying rent at the rate of £12. The rent receipts proved were for the periods up to and ending the 1st May, 1889, 1890, 1891, and 1892. On the 16th June, 1890, the Land Commission made an order on the originating notice of the 19th October, 1887, whereby it was declared that the defendant was to be deemed a tenant of a present tenancy in his holding, and the fair rent was fixed at £118.

On the 13th March, 1893, the defendant served on the plaintiff a notice to quit on the 1st May, 1894.

On the 13th May, 1893, the defendant's sons entered the holding of the plaintiff, and drove off his cattle, putting defendant's cattle on the lands. They acted under the defendant's authority. Defendant remained in possession since the last-mentioned date.

The action was for damages for breaking and entering the plaintiff's lands; and in the alternative for possession of the lands and mesne rates. The defence consisted of traverses of the acts complained of, and an allegation that the defendant was in possession. At the trial the defendant was allowed to amend the defence by raising the case that the letting to the plaintiff was illegal and void under the Land Law (Ireland) Act, 1881, by reason of the defendant being deemed a tenant of a present ordinary tenancy at the date of the letting.

On the trial, before Mr. Justice Gibson, the jury found that the letting constituted a yearly tenancy determinable only by notice to quit, and that the compensation which the plaintiff was entitled to (if any) was £10.

His Lordship decided that the lease must be taken to have been turned into a present tenancy on the date of the application in 1887, and directed a verdict for the defendant, and judgment accordingly.

Drummond, Q.C. (with whom was *P. Law Smith*), for the plaintiff, in support of the motion.

The tenancy of the plaintiff was perfectly legal at the date of

Q. B. Div. 1894.

JOHNSON v. EGAN.

its inception, since the subsequent order of the Land Commission cannot have a retrospective effect. The "application in the prescribed manner" in sect. 1 of the Act of 1887, is the motion in the Court of the Land Commission, not the originating notice. The very form of the notice shows this: "Notice of an application, &c." *Smyth* v. *Moore* (1) is a direct authority for this proposition.

[He also cited *Littleton* v. *M'Namara* (2).]

Gordon, Q.C. and *Denning*, for the defendant, *contra*.

An under-tenancy created by a tenant of a holding under the Land Law (Ireland) Act, 1881, is illegal and void. The words forbidding subletting in sect. 5 of that Act are, if not identical with, quite as strong as those of sect. 10 of Deasy's Act, which make an assignment or subletting contrary to the agreement of tenancy void without the written consent of the landlord: *Donoughmore* v. *Forrest* (3). An act forbidden by a statute is void and without legal effect: *Bartlett* v. *Viner* (4); *Ormsby* v. *Crean* (5); *Tobin* v. *Cleary* (6); *Butler* v. *Smith* (7); *Murtagh* v. *Allen* (8).

The terms of sect. 2 of the Land Law (Ireland) Act, 1887, show that the originating notice is the "application in the prescribed manner" from the date of which the tenant is to be deemed a tenant of a present ordinary tenancy from year to year: *Connolly* v. *Tyrrell* (9). [HOLMES, J.: Was not the plaintiff's under-tenancy lawful at the time it was created?] No; the subsequent adjudication shows that the defendant was on the 27th October, 1887, entitled to make his application to be deemed a present tenant; it is true that until the adjudication by the Land Commission, it was impossible to ascertain whether the defendant had or had not the *status* of a present tenant, and, therefore, whether the subletting by him was legal or illegal; but the adjudication once made must be held to relate back to the date of

(1) 32 L. R. Ir. 129.
(2) Ir. R. 9 C. L. 417.
(3) Ir. R. 5 C. L. 443.
(4) Carthew, 251.
(5) 20 L. R. Ir. 526.
(6) Ir. R. 7 C. L. 17.
(7) 16 Ir. C. L. R. 213.
(8) 27 L. R. Ir. 118.
(9) 32 L. R. Ir. 97.

the application. That is the true meaning of the decision in *Smyth* v. *Moore* (1).

[They also cited *Kennedy* v. *Essex* (2).]

Cur. adv. vult.

April 30.

HARRISON, J. :—

In this case a notice of motion has been served on behalf of the plaintiff that the verdict entered and judgment directed by the Judge at the trial for the defendant may be set aside, and instead thereof that judgment may be entered for the plaintiff for possession of the lands the subject of the action, together with £10 for damages, or that judgment may be entered for the plaintiff for £10 damages for trespass. The action was one of trespass and ejectment on the title. The learned Judge reports that on the trial it was dealt with substantially as an ejectment, and the damages, assessed by the jury at £10, were considered as mesne rates rather than as damages for trespass.

The defendant was tenant to a Mr. Fuller under a lease, which contained no covenant against alienation. Before the Act of 1887 the tenant of course could not get a fair rent fixed; but in October, 1887, he served an application in the prescribed manner to be deemed a present tenant, and to have a fair rent fixed. That application did not come on for adjudication until some two years later, and in the meantime defendant made a letting to the plaintiff of part of the lands, which letting the jury found to be such as constituted a tenancy from year to year. Eventually a fair rent of this holding was fixed, and the contention now on the part of the defendant is that the effect of the order fixing the fair rent was to constitute the defendant a present tenant from the date of the service of the originating notice, and to nullify the under-tenancy created in the interim between the service of the notice and the adjudication thereon.

We are all of opinion that this question has been ruled by the decision of the Court of Appeal in *Smyth* v. *Moore* (1), and unless we are prepared to overrule that case we must hold that the plaintiff here is in the right. In that case the question was as to the effect

(1) 32 L. R. Ir. 129. (2) 28 L. R. Ir. 586.

Q. B. Div. 1894.

JOHNSON v. EGAN

Harrison, J.

of the service of an originating notice under the Land Act of 1887 on the *status* of the tenant who held under a lease. The owners of the tenancy served a notice to fix a fair rent, and shortly afterwards, and before the fair rent was fixed, entered into an agreement to sell the holding to one John Doyle, and served on the landlord a notice of the sale, stating the name of the purchaser and the amount of the purchase-money. The contention before the Land Commission was as to the right of the landlord to refuse to accept the purchaser as his tenant. The Court below held that on the service of the originating notice to fix a fair rent the lessee acquired without any order of the Court the *status* of a present tenant. That was also the contention here. The Court of Appeal held that such was not the effect of the notice. By the case stated for the Court of Appeal two questions were stated on which a decision was asked :—First, whether the service of the originating notice was the " prescribed application " under section 1 of the Act of 1887 ? The Court held that it was, for the purpose of enabling the tenant to proceed to have a fair rent fixed. Secondly, whether upon the service of the originating notice the lessee acquires, without any order of the Court, the *status* of a present tenant of a tenancy from year to year in like manner as if his lease had expired, and the holding becomes subject to all the provisions of the Land Law (Ireland) Act, 1881, with regard to present tenancies ? To that question the Court answered : " No, unless and until the tenant has obtained an order or declaration of the Court upon his application." The Lord Chancellor says (1) :—" The question to which our attention has been directed . . . . is, whether the tenant acquires the *status* of a present tenant after the service of a notice, or whether it is necessary to have a decision on his application before he can acquire the *status*. As Mr. Overend said, the words are ' on the application in the prescribed manner,' and Mr. Overend says that these words mean what they say, that ' application to the Court means application to the Court.' Mr. Ronan says they do not mean what they say, and that they might as well be directed to an application to the landlord as to anyone else. I think the words ' to the Court ' are of most extreme importance.

(1) 32 L. R. Ir. 135.

If the words are not of importance why should they be inserted? Why does not the statute say on application to the landlord if that is what is meant? What is the reason that the Court is mentioned if the Court is to play no part in the matter?" And referring to the judgment of Bewley, J., he says (1):—"I think that the rules of August and September, 1887, all contemplate an application to the Court and a decision by the Court." Fitz Gibbon, L.J., says the same thing in substance, and Barry, L.J., says (2):—"I think we must hold that though for some purposes the service of the originating notice is the application in the prescribed form, yet until the thing is brought to adjudication in due course, the tenant does not acquire the *status* of a present tenant."

Now, in the interval between the service of the notice and the adjudication thereon in this the present case, a legal *bona fide* letting was made by the tenant; and to hold that the order made two years later would disturb that tenancy would be to carry the doctrine of relation further than ever it has been carried before. The case, as I have said, is ruled by the decision of the Court of Appeal in the case of *Smyth* v. *Moore* (3).

A year's notice to quit to expire to-morrow was served by the defendant on the plaintiff, and therefore, although the latter is entitled to have judgment for possession entered for him, yet as his tenancy expires to-morrow we will not allow execution to issue thereon. The plaintiff will have judgment for £10 for mesne rates, with the costs of the action.

JOHNSON, J:—

The defendant held under a lease which did not prevent him from subletting. In 1888, by a tenancy commencing 1st May, he sublet to the plaintiff portion of his holding which, as I understand the finding of the jury, was to be kept in grass. Notice to quit was served to determine that tenancy on the 1st May, 1894; but in May, 1893, the defendant, by his servants, entered on the plaintiff's holding and expelled his cattle. These acts, for which the present action is brought, the defendant justifies, upon the ground that before subletting to the plaintiff he had served, in

(1) 32 L. R. Ir. 135. (2) *Ibid.* 142. (3) *Ibid.* 129.

Q. B. Div. 1894.

JOHNSON v. EGAN.

Johnson, J.

October, 1887, a notice under the Land Act of 1887 on his own landlord to fix a fair rent, which was fixed by order of the Court on the 16th June, 1890. This he contends requires that he shall be deemed a present tenant on and from his application by the originating notice in October, 1887; and consequently, as the second section of the Act of 1881 prohibits subletting, therefore the subletting made by him to the plaintiff in 1888 is void: *Ormsby* v. *Crean* (1), and that at most the plaintiff, from and since the 16th June, 1890, has been in occupation of this holding only by the oral licence of the defendant, and not as a tenant. In any event the jury have found that if the plaintiff was merely a licensee, the license was not determined before the acts of which the plaintiff complains; but the much larger question has been argued, and I think the point which we are called upon to decide is involved in the decision of the Court of Appeal in *Smyth* v. *Moore* (2). The ground of that decision, as I understand it, is that the service of the originating notice by a lessee is only the initial step to obtain (by proceeding according to the course of the Land Court) the ultimate adjudication of a present tenancy which when made does in certain cases relate back; but that to acquire the *status* (as it is termed) of a present tenant, the lessee must not only, when his originating notice is served, but thenceforth continuously, up to the adjudication, fulfil the statutable conditions which entitle him to the order which adjudges him to be a present tenant:—"It is plain that the right to the *status* of a present tenant might even exist at the date of the notice, and be lost before the case is heard; for example, by parting with the possession": Fitz Gibbon, L.J., in *Smyth* v. *Moore* (2). That anticipates the present case. The defendant, after serving his originating notice, parted with the occupation of a portion of his holding by lawfully subletting it to the present plaintiff, who occupied the holding under that tenancy, and was in the occupation of it when the adjudication of the 16th June, 1890, was made. The tenant, the present plaintiff, was no party to those proceedings of the now defendant, and it would be strange that an adjudication obtained in those proceedings behind the back of the

(1) 20 L. R. Ir. 526. (2) 32 L. R. Ir. 140.

present plaintiff (the occupying sub-tenant) should so relate back to the originating notice as to overreach the whole interval, and by such relation avoid and annul the now plaintiff's tenancy, which the now defendant had lawfully created.

The discussion on the Subletting Acts, and the provision against subletting in the Act of 1860, do not appear in point, because in those cases the landlord and his tenant contracted that the tenant should not sublet; and between 1826 and 1832, such a contract was implied by statute. The effect of the Subletting Acts on such contract was to make the attempted subletting contrary to the contract *eo instante* null and void; to prevent any sub-tenancy ever coming into existence, and thus the sub-lessor could defeat his own attempt to sublet, but in the present case the subletting was lawful at the time it was made; by making it, the now defendant ceased presumably to be in *bona fide* occupation of his holding; but this fact not being (as it would appear) before the Court, he procured the adjudication of present tenancy, which he now sets up and relies on by relation back to overreach and annul the sub-tenancy he created. In this, in my opinion, he fails, as he ought to fail; and the plaintiff is entitled to maintain the action, and recover the £10 damages which the plaintiff's counsel agrees to take.

HOLMES, J.:—

I am of opinion that this case is disposed of by the findings of the jury, taken in connection with the decision in *Smyth* v. *Moore* (1).

It must be assumed that the plaintiff at the time of the commencement and trial of the action, was entitled to a yearly tenancy in the lands, if, in the events that have happened, the defendant, in 1888, had power to create such a tenancy; and it is admitted that he had the power, unless the effect of the notice served in 1887, and of the adjudication thereon in 1890, was to deprive him of it.

Whether the mere service of an originating notice by a leaseholder, pursuant to the 1st section of the Land Law (Ireland) Act, 1887, and the Rules thereunder, converted him into a present

(1) 32 L. R. Ir. 129.

Q. B. Div. 1894.

JOHNSON v. EGAN.

Holmes, J.

tenant from year to year, with all the privileges and restrictions which the Legislature has attached to that tenure, is a question deserving the most careful consideration. It was open to argument upon the construction of the statute and the Rules that the leaseholder became a present yearly tenant at the moment he served the notice. The Land Commissioners were naturally desirous that a matter of such general importance should be authoritatively decided, and accordingly they stated a case for the Court of Appeal, presenting two questions, the answers to which it was hoped would be a guide for the future. Very distinct and definite answers were given, and they seem to me to dispose of the present case. It was declared by the Court that the only effect of the originating notice was to enable the tenant to proceed to obtain an order or adjudication, and that unless and until he obtained such order or adjudication he did not acquire the *status* of a present tenant from year to year. No doubt, as was said by Lord Justice Fitz Gibbon, the adjudication when obtained, will, in certain cases, relate back—that is to say, in the cases and for the purposes declared by the statute, or to be inferred from its provisions. But there is nothing in the enactments on this subject to give the adjudication a retrospective operation for the purpose of defeating an estate theretofore acquired, of making a lawful act unlawful, and of converting the legal occupation of a tenant into a continuing trespass.

Solicitor for the plaintiff: *W. P. Kelly.*
Solicitors for the defendant: *Hoey & Denning.*

G. G.

REG. (BRIDGEMAN) *v.* DRURY (1).

Q. B. Div. 1894.

Feb. 19–21. May 1.

Municipal expenditure—Local Government Board—Auditor—Enforcing surcharges—"Person aggrieved"—Certiorari—*Discretion*—Mandamus—*Local Government* (*Ireland*) *Act*, 1871 (34 & 35 *Vict. c.* 109), *sections* 11, 12, *and* 13.

By 34 & 35 Vict. c. 109, s. 11, the accounts of municipal bodies in Ireland are directed to be audited yearly by the auditor of accounts relating to the relief of the poor in the locality;—and, by section 12, any person aggrieved by the allowance, disallowance, or surcharge of any sum by such auditor, may apply to the Queen's Bench for a writ of *certiorari*, and the Court, if it appear that the auditor's decision was erroneous, shall order the payment of such sum improperly allowed, disallowed, or surcharged, to the party entitled thereto by the party who ought to repay the same; or any person so aggrieved may, in lieu of such application, apply to the [Local Government Board (2)] to inquire into and decide upon the lawfulness of the reasons stated by the auditor for such allowance or disallowance, and it shall thereupon be lawful for the [Local Government Board (2)] to issue such order therein as they may deem requisite for determining the question.

In auditing the accounts of the Corporation of Dublin for the year ending the 31st December, 1892, D. (the Local Government Board auditor) *allowed* (*a*) a sum of £880 expended in connexion with extensions (alleged not to have been duly authorized) of the new supper-room of the Mansion House; (*b*) a sum of £96 17*s.*, expenses of floral decorations of the Mansion House on the occasions of balls, dinner-parties, &c.; (*c*) a sum of £27 in respect of the travelling expenses of members of the Corporation, some not being members of the Waterworks Committee, on the occasion of the Annual Inspection of the Vartry Waterworks, below mentioned; and he *disallowed* (*d*) the sum of £120 paid to the architect who superintended the extensions above mentioned of the new supper-room; (*e*) the sum of £5 5*s.* paid for the illumination of a certificate of the Freedom of the City presented to the Provost of Trinity College, Dublin; and (*f*) the sum of £51 16*s.* 8*d.* (part of £88 12*s.* 1*d.*), being the expense of luncheons partaken of by members of the Corporation, members of the Waterworks Committee and others, on the occasion of the Annual Inspection of the Vartry Waterworks in the year 1892, and the sum of £3 3*s.* for luncheons on the occasion of a "Sanitary Inspection" of the said Waterworks,

(1) Before SIR P. O'BRIEN, C.J., and O'BRIEN, JOHNSON, and MADDEN, JJ.

(2) As amended by 35 & 36 Vict. c. 69, s. 4.

Q. B. Div. 1894.

THE QUEEN v. DRURY.

surcharging these amounts against the members of the Committees of the Council by whom the payments had been made.

These Committees communicated by letter with the Local Government Board, who treated their communications as an appeal by persons aggrieved, within 34 & 35 Vict. c. 109, s. 12, and, after considering the matter, expressed to the auditor their opinion (which the auditor followed) that no further action should be taken to enforce the surcharges.

On motion to make absolute a conditional order obtained by B., a ratepayer, for a writ of *certiorari* to remove and quash the allowances so made, and for a writ of *mandamus* to compel the auditor to enforce the disallowances by recovering the amount of same from the persons against whom they had been or should have been certified to be due:—

Held (*per* Sir P. O'Brien, C.J., O'Brien and Madden, JJ.), that there was no appeal pending before the Local Government Board within section 12 of the Local Government Board (Ireland) Act, 1871, to oust the authority conferred upon the Court by the same section; that the auditor had properly allowed (*a*) £880 (extension of new supper-room); had improperly allowed (*b*) £96 17*s.* (floral decorations); had improperly allowed that part (*i. e.* £12 11*s.* 2*d.*) of (*c*) £27 (travelling expenses) which related to the expenses of members of the Corporation not being members of the Waterworks Committee; that he had improperly disallowed (*d*) £120 (architect's fee) and (*e*) £5 5*s.* (certificate of Freedom); and had properly disallowed (*f*) £51 16*s.* 8*d.* and £3 3*s.* (Vartry luncheons); that accordingly a writ of *certiorari* must issue, to remove the erroneous allowances of (*b*) £96 17*s.* (floral decorations), and (*c*) part (*i. e.* £12 11*s.* 2*d.*) of £27 (travelling expenses), and therewith an immediate order, under the statute, enforcing the surcharge of these sums; and that a writ of *mandamus* should issue to enforce the surcharge of (*f*) £51 16*s.* 8*d.* and £3 3*s.* (Vartry luncheons), which had been properly disallowed.

Per Johnson, J. (who concurred as to the allowances), that an appeal was pending before the Local Government Board in reference to the disallowances, and that therefore the Court could not interfere as to the disallowance of (*f*) £51 16*s.* 8*d.* and £3 3*s.* (Vartry luncheons).

Where borough rates are misapplied by Committees of the governing body of a borough, and the amount so misapplied is surcharged against the members of the Committees by whom the payment is made, a ratepayer of the borough is a person aggrieved within sect. 12 of 34 & 35 Vict. c. 109. The Committees are not, although the individual members so surcharged are, persons so aggrieved.

Per Sir P. O'Brien, C.J., such ratepayer, as being specially aggrieved by misapplication of the rates, would be entitled at common law, and independently of the statute, to a writ of *certiorari* as of right.

Per Madden, J., at common law, where a person comes forward to redress an individual grievance, the writ of *certiorari* issues as of right; where a person comes forward to assert a right in which a more or less numerous class of

the public are interested, the issue of the writ is within the discretion of the Court.

Reg. v. *Justices of Surrey* (L. R. 5 Q. B. 466) discussed.

Under 34 & 35 Vict. c. 109 (amended by 35 & 36 Vict. c. 69, s. 4) the authority of the Local Government Board in regard to their auditor, when engaged in the audit of the accounts of municipal bodies in Ireland, is that solely of an appellate tribunal, to decide upon the lawfulness of reasons definitely brought before them by a person aggrieved by any decision of such auditor.

MOTION to make absolute, notwithstanding the cause shown, a conditional order, dated 6th February, 1894, for a writ of *certiorari*, directed to James W. Drury, Local Government Board Auditor, to remove and quash certain orders made by him in his audit of the accounts of the Corporation of Dublin, for the year ending 31st December, 1892, whereby he allowed—(*a*) the sum of £1000, or thereabouts (*i. e.* £880), as being so much of the sum of £2400, expended on providing a new supper-room for the Mansion House (the official residence of the Mayor of the borough), as was unauthorized by the Council of the said borough; (*b*) the sum of £96 17*s.*, as for the expense of floral decorations of the Mansion House on the occasions of balls, dinner parties, &c.; (*c*) the sum of £27 18*s.* 8*d.*, for travelling expenses, in the case of members of the Council, not being members of the Waterworks Committee of the Corporation, on the occasion of the inspection of the Vartry Waterworks in the month of August, 1892: upon the grounds that said orders and allowances were illegal and unfounded for the reasons stated by the auditor in his report; and that the payment of these sums was made without and in excess of jurisdiction, and were wholly *ultra vires*, and not within the competence of the committee, person, or persons who authorized them; and that such payments were contrary to law, and founded on no due or sufficient compliance with the requirements in that behalf; and for a writ of *mandamus* directed to the said auditor, commanding that he, according to law, and to his duty and authority in the premises, should proceed to recover from the persons, against whom the same had been, or ought to have been, certified to be due, all disallowances and sums surcharged by the auditor in his audit of the said accounts.

The disallowances, in regard to which this writ of *mandamus*

Q. B. Div. 1894.

THE QUEEN v. DRURY.

was sought were:—(*d*) £120, being the fee paid to Mr. Ashlin, architect, who was employed in connexion with the increased expenditure upon the said supper-room; (*e*) £5 5*s.* paid by the Finance and Leases Committee of the Corporation for the illumination of a Certificate of Freedom bestowed on the Provost of Trinity College, Dublin; (*f*) £51 16*s.* 8*d.*, part of the sum of £88 12*s.* 1*d.* paid for luncheons partaken of by the members of the Corporation, on the occasion of the "Annual Inspection" of the Vartry Waterworks, and a further sum of £3 3*s.* paid for luncheon on the occasion of a "Sanitary Inspection" of the Vartry Waterworks.

The facts of the case appear sufficiently in the judgments.

D. B. Sullivan, Q.C., *John Ross, Q.C.*, and *T. S. F. Battersby*, for the prosecutor, Joseph Bridgeman.

The Attorney-General (*The Mac Dermot, Q.C.*), *the Right Hon. John Atkinson, Q.C.*, and *Alexander Blood*, for James W. Drury, Local Government Board Auditor.

Michael Drummond, Q.C., and *Macinerney*, for the Corporation of Dublin.

The Solicitor-General (*Hemphill, Q. C.*), and *Monahan, Q.C.*, for the Local Government Board.

Cur. adv. vult.

May 1.

SIR PETER O'BRIEN, C.J.:—

An application in this matter has been made for writs of *certiorari* and *mandamus* to compel Mr. Drury, a Local Government Board auditor, to bring into Court certain orders of allowance and disallowance made by him in his audit of the Corporation accounts, in order that so much of said orders as are allowance may be quashed and dealt with according to law, and in order that so much of said orders as are disallowance may be enforced. We reserved judgment in the case, because it involved important considerations as to the principles upon which the Court should act in granting writs of *certiorari* and *mandamus*.

The items in the account which are the subject-matter of

controversy are six in all:—1, an allowance of a sum of £880 expended in the construction of a new supper-room at the Mansion House; 2, a disallowance of a fee of £120 to Mr. Ashlin, an architect, who supervised the work in connexion with the erection of the supper-room; 3, a disallowance in respect of a sum of £5 5*s.* paid by the Finance and Leases Committee for the illumination of a certificate of the Freedom of the City bestowed on the Provost of Trinity College; 4, an allowance of the sum of £96 17*s.*, expenses of floral decorations on the occasions of balls and dinner parties; 5, disallowances of certain sums of £51 16*s.* 8*d.* and £3 3*s.*, which were charges made in respect of expenditure for lunch taken by the members of the Corporation on the occasion of a visit to the Vartry Waterworks; 6, an allowance of a sum of £27 in respect of the travelling expenses of the members of the Corporation on the same occasion.

These are all the items in controversy. As regards the first item of £880 for the supper-room, the allowance in respect of this has been challenged, because it was not expressly sanctioned by order in Council. No doubt the action of the Corporation was somewhat irregular with reference to it. But having regard to the circumstances under which, and the object for which, it was expended, we think that Mr. Drury was right in allowing it. A new supper-room was necessary. Its construction had been sanctioned by the Council. The amount sanctioned had proved inadequate; and the additional expenditure—the £880 which has been challenged—was necessary to complete the construction of that which had been authorized. The entire sum expended was included in the accounts of the Corporation, and that expenditure as a whole was passed and adopted by the Corporation; though, indeed, as Mr. Ross stated in his able argument, it would have been difficult from the accounts themselves to see that this expenditure, appearing as sanctioned in what were called the breviates, was sanctioned in reference to the supper-room in question. Certainly, Mr. Bridgeman knew nothing of it, until the matter came into Court. It would be far more satisfactory if such additional expenditure was directly and expressly sanctioned by order of Council. However, it was a necessary work, carried out for the benefit of the citizens, and now forming part of the

Q. B. Div. 1894.

THE QUEEN v. DRURY.

Corporate estate, and it has been accepted by the whole body of the Corporation. In our opinion the auditor was right, under the circumstances of the particular case, in sanctioning the expenditure.

Sir P. O'Brien, C.J.

As to the disallowance of £120, amount paid to Mr. Ashlin, the architect, the matter is far from clear. But, having regard to the fact that the supper-room was necessary, that its construction was sanctioned, and to the fact that the architect of the Corporation was absolutely incapacitated by illness, we think that the employment and payment of Mr. Ashlin were justified. His employment was necessary in relation to work which has benefited the corporate property, and the benefit of which the Corporation had accepted. In our opinion the remuneration paid to him under the circumstances should have been allowed.

The third item is the disallowance of £5 5*s.* in respect of the Certificate of Freedom presented to the Provost of Trinity College. We think that this should have been allowed. A certificate is always, and I would say necessarily, given to the recipient of that honour, and I do not think the Corporation were unauthorized to add a little illumination. At all events, this is a small matter, and was not pressed in argument.

The fourth item is the sum allowed for floral decorations on the occasion of balls and dinner-parties. It appears to us that there is no sanction whatever for this expenditure. Mr. Drury in his report says that it is difficult to believe that this is a necessary expenditure, and that he was decidedly of opinion that the expense of floral decorations on occasions of balls, dinner-parties, &c., should not be paid out of the public funds. However, following the bad example of his predecessors, he allowed this sum, contrary to his own opinion, in deference to precedent. How can this allowance be justified? Expenditure on flowers does not benefit the corporate property. The Lord Mayor is allowed a substantial salary, which is supposed to cover the expense of entertainment, and as well might it be sought to justify the cost of the viands as the cost of the decoration of the civic banquets. The case of *Reg.* (*M'Evoy*) v. *Corporation of Dublin* (1) has been referred to; but that

(1) 2 L. R. Ir. 371.

case, so far as it goes, is an authority to show that the expenditure is not justified. Among the many questions in that case was one with reference to a certain item for gas used in the Mansion House. Mr. Justice Fitz Gerald's opinion has been referred to. He is reported to have said :—"It appears to me that the Corporation have full power over that item, and that they are entitled in maintaining the Mansion House, if they choose, to consider it an item of maintenance." But, in the same case, Chief Justice May said :—"I must confess that I do not see on what principle gas consumed at the residence of the Lord Mayor can be chargeable against the borough fund." The late Mr. Justice O'Brien is reported to have concurred in the judgment of Chief Justice May, so that the majority of the Court seem to have decided that a charge for gas as against the borough fund could not be maintained. About gas-fittings there might, perhaps, be some question, for these might become part and parcel of the corporate property ; but I cannot understand how expenditure incurred in respect of the aeriform fluid called gas could be charged as against the borough fund ; as well might the cost of candles be sought to be charged.

I now come to deal with the expenditure in respect of the lunch. This is the most interesting item with which we have to deal. How can it be maintained ? I shall read from the report of Mr. Drury what his views are. Mr. Drury says :—

"In my last report I directed attention to the expense incurred in connexion with what is called the 'Annual Inspection' of the Vartry Waterworks, and I intimated my opinion that portion of it, at least, was not lawful, and gave the Committee the opportunity of considering their position before again incurring a similar expenditure in 1892. The Committee referred my observations to the Law Agent for report, limiting their inquiry, however, to the point 'as to the legality of members of the Corporation, not being members of the Waterworks Committee, being permitted to join the inspection, and have their expenses paid.' Mr. Mac Sheehy gave it as his opinion that:—'There is no question of the right of every member of the Corporation, without any permission, to attend any and every inspection of any portion of the corporate property; but I am of opinion that it is not legal that his expenses and entertainment while doing so should be paid out of the rates.' In spite of this clear and deliberate opinion from their legal adviser, the Committee appointed a day for the inspection ; left the arrangements in the chairman's hands ; directed that the Council should be informed of the date, and arranged the price to be

Q. B. Div. 1894.

charged to members of the Council for guests. It would be hard to imagine a more deliberate challenge than this."

THE QUEEN v. DRURY.

Sir P. O'Brien, C.J.

Now I think it is relevant to refer to the character of this luncheon. I have before me the items in the bill. Amongst the list of wines are two dozen champagne, Ayala, 1885—a very good brand—at 84*s.* a dozen; one dozen Marcobrunn hock—a very nice hock; one dozen Château Margaux—an excellent claret; one dozen fine old Dublin whiskey—the best whiskey that can be got; one case of Ayala; six bottles of Amontillado sherry—a stimulating sherry; and the ninth item is some more fine Dublin whiskey! Then Mr. Lovell supplies the '*dinner*' (this was a dinner, not a mere luncheon!) including all attendance, at 10*s.* per head. There is an allowance for brakes; one box of cigars, 100; coachmen's dinner; beer, stout, minerals in syphons, and ice for wine. There is dessert, and there are sandwiches, and an allowance for four glasses broken—a very small number broken under the circumstances.

In sober earnestness, what was this luncheon and outing? It seems to me to have been a pic-nic on an expensive scale. What authority is there for it? No statutable authority exists. By what principle of our common law is it sustainable? By none that I can see. In *M'Evoy's Case* (1), to which I have already referred, there was a question of maintaining the Mansion House, being the property of the Corporation. But this is a question of providing a sumptuous repast for the members of the Corporation on the Wicklow hills. It is not certainly for the benefit of the property of the Corporation, or of the rate-paying citizens of Dublin, that the members of the Corporation should lunch sumptuously. I asked for statute or for case, but neither was cited. The Solicitor-General in his most able argument—I have always to guard myself against his plausibility—appealed pathetically to common sense; he asked, really with tears in his voice, whether the members of the Corporation should starve; he drew a most gruesome picture; he represented that the members of the Corporation would really traverse the Wicklow hills in a spectral condition, unless they were sustained by lunch. I do not know, whether he went so far as Ayala, Marcobrunn, Château Margaux, old

(1) 2 L. R. Ir. 371.

Dublin whiskey, and cigars. In answer to the pathetic appeal of the Solicitor-General, we do not say that the members of the Corporation are not to lunch. But we do say that they are not to do so at the expense of the citizens of Dublin. They cannot banquet at their expense in the Mansion House, and, in our opinion, they cannot lunch at their expense in Wicklow. We agree with the opinion of the Law Adviser of the Corporation—an excellent opinion of a most admirable officer—when he expressed himself to the effect that the payment of the expenses and entertainment of the general body of the Corporation, when inspecting the Vartry Works, could not be legally justified. Whatever the action of the Corporation was, there is no doubt that the legal opinion of its most excellent legal adviser cannot be in any way impugned. This opinion derives considerable support from the provisions of the 24 & 25 Vict. c. clxxii., which enacts that the Council of the Corporation should appoint out of their own body a committee for carrying into execution the works and purposes of the Act—that is to say, the Waterworks, in reference to which the visit took place. Having regard to the duties imposed on this Committee, we think their travelling expenses—that is to say, the travelling expenses of so many of the persons who went to the Waterworks on the day in question as were members of the Waterworks Committee—should be allowed. But we cannot find any statutable authority or any decided case or any principle of law which would justify us in sanctioning the expenses of luncheon or entertainment so far even as relates to them. They should support themselves whilst in Dublin. This was in any case necessary. We can find no legal sanction for lunch of even a moderate character on such an occasion, but certainly the particular luncheon was infected in every part of it with excess. But the expenses of travelling, which were necessarily incurred in the discharge of a statutable duty, ought, we think, to be allowed. Accordingly, we think that a proportion of the travelling expenses should be sanctioned, and that the balance should be disallowed and surcharged.

The result, then, is that the sum expended on the supper-room should be allowed; the money paid to the architect, Mr. Ashlin, should be allowed; the £5 5*s.* of the certificate of the freedom

Q. B. Div. 1894.

THE QUEEN v. DRURY.

Sir P. O'Brien, C.J.

presented to the Provost of Trinity College should be allowed; so much of the travelling expenses as relate to members who were out on the excursion or inspection, and were members of the Waterworks Committee, should be allowed. But the expenditure for the decorations, the luncheon, and the travelling expenses of those who were not members of the Waterworks Committee, should be disallowed.

There remains the question, what practical steps should be taken? Ought we to grant writs of *certiorari* and *mandamus* in order that the orders making unjustifiable allowances should be quashed, and the order of disallowance, properly made, enforced. This raises a question of very general importance, and of far more importance, I think, than any question about this lunch. As regards the allowances which ought not to have been made, should a writ of *certiorari* issue? It has been said that this is a matter of discretion; and upon this point *The Queen* v. *The Justices of Roscommon* (1) has been cited. But that was a wholly different case. It was an application by the auditor of the Local Government Board—not a ratepayer. He was not specially aggrieved; and the persons who were sought to be surcharged in that case, namely, the guardians, had been misled by the terms of the sealed order of the Local Government Board, of whom the applicant, Jephson, who applied for the *certiorari*, was an officer. Here the applicant, Mr. Bridgeman, is a ratepayer; he is, in my opinion, specially grieved, and we cannot see that he is in any default whatever. Besides, it is to be remembered that in that case the order for the *certiorari* was granted, though the writ of *mandamus* was refused.

I turn to the Local Government (Ireland) Act of 1871 (34 & 35 Vict. c. 109), which provides, section 12:—

"It shall be lawful for every person aggrieved by any such allowance, and for every person aggrieved by such disallowance or surcharge, if such last-mentioned person have first paid or delivered over to any person authorized to receive the same, all such money, goods, and chattels as are admitted by his account to be due from him or remaining in his hands, to apply to the Court of Queen's Bench for a writ of *certiorari* to remove into the said Court the said allowance,

(1) 12 L. R. Ir. 331.

disallowance, or surcharge, in the like manner, and subject to the like conditions as are provided in respect of persons suing forth writs of *certiorari* for the removal of orders of justices of the peace."

In my judgment, once a person is aggrieved within the meaning of that section of the statute, the writ of *certiorari* should be granted unless the applicant has in some way by his own default disentitled himself to it. Mr. Bridgeman has in no way disentitled himself to it. As a general rule an applicant may be precluded by conduct, acquiescence, laches, or by difficulties arising by liability being imposed by a judgment of a Court of Record, as was pointed out by Chief Justice Lefroy in the case of *Re County Mayo Presentments* (1). In my judgment a ratepayer is clearly aggrieved if his money is applied to an unauthorized purpose. It is a typical instance of "being aggrieved." The wrong application of money which comes from the ratepayer's own pocket is a very acute grievance. This is our view, founded upon the Act of Parliament, which I think contemplates the writ being granted in such a case as the present. The existing grievance is one that the Act contemplates might arise, and the remedy is indicated by the Act. An allowance has been wrongly made, and the mode of redress is provided by the statute.

In support of this view, and in reference to the principles upon which the Court acts in granting the writ, I would refer to the leading case upon the subject: *Reg.* v. *Justices of Surrey* (2), a case of the very highest authority, decided by the most distinguished judges, Cockburn, Blackburn, and Mellor. All through the discussion of the present case, and indeed in the books of practice, there has been a certain vagueness as to the principles which regulate the granting of the writ of *certiorari*. It was said, or rather I should say assumed, that the granting of the writ was always, and under all circumstances, not *ex debito justitiæ*, but resting in the all but absolute discretion of the Court. Now the whole subject was carefully reviewed in *Reg.* v. *Justices of Surrey* (2). All the authorities were collected and cited in the argument, and judgment was given by that very distinguished

(1) 14 Ir. C. L. R. 392. (2) L. R. 5 Q. B. 466.

Q. B. Div. 1894.

THE QUEEN v. DRURY.

Sir P. O'Brien, C.J

judge, Lord Blackburn. It appears from that case that some public roads had been closed by an order made by two Justices on an application of the highway board of the district, and an inhabitant of one of the parishes, living in the neighbourhood of these roads, applied and obtained a rule for a *certiorari* to bring up and quash the order of the Justices. It was argued at great length that the writ was in the discretion of the Court, and should be refused. Lord Blackburn says, p. 472:—

"And it was urged that the writ of *certiorari* was not of right, and that this Court, in its discretion, would not issue it to give effect to an objection certainly not affecting the merits. On this we took time to consider, as the question to what extent the Court is bound to grant a *certiorari*, or may in its discretion withhold it, is one of great importance. It is quite clear that, except when applied for on behalf of the Crown, the *certiorari* is not a writ of course. The Court must be satisfied on affidavits that there is sufficient ground for issuing it, and it must in every case be a question for the Court to decide, whether, in fact, sufficient grounds do exist. But in the present case we are satisfied that in fact no notice was affixed at Benbow Corner, and that, therefore, the orders complained of were made without jurisdiction, and the question arises whether this Court ought to refuse the *certiorari*.

"In the very analogous case of prohibition a distinction is taken, thus expressed by Cockburn, C.J., in *Forster* v. *Forster* (4 B. & S. at p. 199; 32 L. J., Q. B. at p. 314):—'I entirely concur in the proposition that, although the Court will listen to a person who is a stranger, and who interferes to point out that some other Court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained; yet that is not *ex debito justitiæ*, but a matter upon which the Court may properly exercise its discretion, as distinguished from the case of a party aggrieved, who is entitled to relief *ex debito justitiæ*, if he suffers from the usurpation of jurisdiction by another Court.'

"The same distinction between an application by a party aggrieved and by one who comes merely as a stranger to inform the Court is taken as to *certiorari* in *Arthur* v. *Commissioners of Sewers* (8 Mod. 331), where one of the Judges said 'that a *certiorari* was not a writ of right, for if it was it could never be denied to grant it; but that has often been denied by this Court, who, upon consideration of the circumstances of cases, may deny it, or grant it at discretion; so that it is not always a writ of right. It is true where a man is chosen into an office or place, by virtue whereof he has a temporal right, and is deprived thereof by an inferior jurisdiction who proceed in a summary way, in such case he is entitled to a *certiorari ex debito justitiæ*, because he has no other remedy, being bound by the judgment of the inferior judicature.

"Where the party grieved has by his conduct precluded himself from

taking an objection, the Court will not permit him to make it, as in *Reg.* v. *South Holland Drainage Committee* (8 Ad. & E. 429).

"In other cases, where the application is by the party grieved, so as to answer the same purpose as a writ of error, we think that it ought to be treated, like a writ of error, as *ex debito justitiæ;* but where the applicant is not a party grieved (who substantially brings error to redress his private wrong), but comes forward as one of the general public having no particular interest in the matter, the Court has a discretion; and if it thinks that no good would be done to the public by quashing the order, it is not bound to grant it at the instance of such a person. Thus, in *Reg.* v. *Newborough* (L. R. 4 Q. B. 585), where the application was made for a *certiorari* to bring up an order on the treasurer of the county of Carnarvon to pay £95 1*s.* 3*d.*, being the amount of certain allowances to, and expenses incurred in respect of, special constables, but not till after the treasurer had paid the money and his accounts had been allowed at the sessions, so that the applicants, though ratepayers, could obtain no benefit from quashing the order, as the money could never be recovered back, Lush and Hayes, JJ., then sitting in the Bail Court, thought they were not bound to grant the *certiorari*, though the order was informal and probably void. And we think they were right; but, as is distinctly stated by my brother Lush, the question would have been different, if the order had not been acted upon, and the money paid, and the accounts allowed."

Such is the language of Lord Blackburn. Is it to be said—can it be contended with a semblance of foundation—that there is any analogy between a person like Mr. Bridgeman, whose money is misapplied, and a person who comes forward as a mere member of the general public, having no particular interest in the matter? It is in my judgment a typical instance of grievance—special, peculiar, and acute—in the case of every ratepayer whose money was applied for such unauthorized illegal purposes. And what Lord Blackburn said with reference to *The Queen* v. *Newborough* (1), a case where ratepayers were concerned, is to be specially noted. His words are:—

"But as is distinctly stated by my brother Lush, the question would have been different, if the order had not been acted upon, and the money paid and the accounts allowed."

That is to say, if the granting of the order would not under the circumstances have been futile it would have been granted. The

(1) L. R. 4 Q. B. 585.

Q. B. Div. 1894.

THE QUEEN v. DRURY.

Sir P. O'Brien, C.J.

ratio decidendi of the Court in that case is well expressed in the headnote, which states that the Court, in the exercise of its discretion, would not grant a *certiorari* to bring up the order, as the proceedings were completely finished, *and no benefit could arise from re-opening them.* Lord Blackburn continues :—

"We find no case inconsistent with this distinction, which we think is a sound one, and therefore we think that, in exercising our discretion, we must see whether the present applicant is in the condition of a person grieved, applying for the *certiorari* to remove an order made without jurisdiction which affects his interests."

In my judgment the allowance for the floral decorations was made without jurisdiction. It was illegal to sanction an unlawful and unauthorized application of the rates, and by this illegal allowance the interests of the applicant were directly affected. Lord Blackburn's judgment proceeds :—

"In *Rex* v. *Taunton St. Mary's* (3 M. & S. 465, 472)—an indictment for not repairing a highway had been removed by *certiorari*, and the question was whether the prosecutors were parties grieved so as to entitle them to costs. Lord Ellenborough says :—'Certainly a person does not answer to the character of a person grieved who is only, in common with the rest of the subjects, inconvenienced by the nuisance. But here it appears that those persons have, by reason of their local situation, a peculiar grievance of their own.' This is exactly the position of the present applicant."

This, in my opinion, is the position of Mr. Bridgeman. He is specially, peculiarly, aggrieved by having his money misapplied, and he is not the less so because he shares his grievance with a certain class of ratepayers. It cannot, with any show of reason, be said that he or they are in the position of the general public. The general public are not aggrieved at all. It is the man, and every one of the men, whose interests were directly prejudiced that were aggrieved. In *Rex* v. *Taunton St. Mary's* (1) several persons who suffered the same inconvenience—that is to say, who had to make a round to go to their homes—were held to be specially aggrieved; and it appears to me that the misapplication of the money of an individual, or of a number of individuals, is

(1) 3 M. & S. 465, 472.

at least as strong a grievance as that which arises from being compelled to take a circuitous route, which Lord Ellenborough said was "a peculiar personal grievance beyond that which affects the public at large."

Sir P. O'Brien, C.J.

The pre-eminent authority of *The Queen* v. *Justices of Surrey* (1) is, of course, recognized by Lord Fitzgerald in the case of *In re Listowel* (2). That case, as Lord Fitzgerald showed, was wholly distinguishable. There was laches in applying for the writ, and also other grounds of distinction, which are indicated in the judgment of the Court. Lord Fitzgerald's own observations in the case of the *County Mayo Presentments* (3) are not inapposite. He says (p. 431) :—

"If this had been a case in which Mr. Rutledge alone was affected, if he appeared here to defend merely his own private rights, and yet had been guilty of this delay, that would have been a ground on which we might have refused the application; though it seems to me that the writ of *certiorari* so nearly approaches the confines of matter of right, that we might perhaps have granted it even in that case. But this is a case of public importance, affecting the rights of large numbers of persons, and affecting the rights of persons who are to come into possession of property years hence; and it would be very strong to say that we are to stay our hands because this delay, from which no public injury could arise, has occurred."

I therefore think that whether we regard the scope of the statute, or the general law applicable to the writ of *certiorari*, it should, in the present instance, be granted in the case of these unjustifiable allowances, and, if the writ is granted, section 12 becomes mandatory upon the Court, for it says :—

"And if it appear to such Court that the decision of the said auditor was erroneous, they *shall* by rule of the Court order such sum of money as may have been improperly allowed, disallowed, or surcharged, to be paid to the party entitled thereto by the party who ought to repay or discharge the same."

We are obliged by the intention and scope of the Act of Parliament, and by the principles which should regulate the action of this Court in cases of the kind, to grant the *certiorari*;

(1) L. R. 5 Q. B. 466. (2) Ir. R. 9 C. L. 46. (3) 14 Ir. C. L. R. 392.

Q. B. Div. 1894.

THE QUEEN v. DRURY.

Sir P. O'Brien, C.J.

and, once the writ issues, we are compelled by the mandatory language of the section to direct that these sums should be repaid. The opinion of the auditor was wrong, and therefore we must order that the money improperly allowed be repaid to the party entitled thereto under the statute.

With reference to the disallowance of the luncheon, it was said that there was an appeal to the Local Government Board, and that, therefore, as far as we were concerned, there was an end of the matter. We all agree that the disallowance was properly made, but my brother Johnson is of opinion that we are precluded from granting a *mandamus* with respect to it, inasmuch as he thinks an appeal has been taken in relation to it to the Local Government Board.

The last clause of sect. 12 is as follows:—

"Provided always that it shall be lawful for any person aggrieved as aforesaid by any allowance, disallowance, or surcharge, in lieu of making application to the Court of Queen's Bench for a writ of *certiorari*, to apply to the Chief Secretary to inquire into and to decide upon the lawfulness of the reasons stated by the auditor for such allowance, disallowance, or surcharge, and it shall thereupon be lawful for the Chief Secretary to issue such order therein, under his hand, as he may deem requisite for determining the question."

It was said that there was an appeal in this case, and, there being an appeal, that our jurisdiction in the matter is ousted. No doubt, in the correspondence that took place, the Local Government Board said that they would deal with the letters before them as an appeal; but it appears to me that there was no statutory appeal whatever. There was a representation made by a Committee, which the Local Government Board said they would deal with as an appeal; but the Act of Parliament says that the appeal must be by a "person aggrieved."

Supposing that there was an application made to us to compel the Local Government Board to entertain and dispose of this appeal, would they be precluded from denying the formality of the appeal, or from saying there was no statutory appeal, by reason of their benevolent undertaking to a Committee to treat the correspondence as an appeal? Or would this Court be justified in granting a writ of *mandamus* against the Local Government Board

by reason of such correspondence and undertaking? I think not. It was not an appeal by a person aggrieved; it was a mere representation by a Committee of the Corporation, epistolary and personal. I do not think there was, within the meaning of sect. 12 of the Act, a statement by the auditor of his reasons for the disallowance, nor do I think there was, within the meaning of the proviso at the end of sect. 12, an application to the Local Government Board to inquire into and decide upon the lawfulness of the reasons, as therein contemplated.

But, if there was an appeal, what has become of it? Where is any order disposing of it? Mr. Atkinson asserted it was still pending. I asked the learned Attorney-General did he agree with his colleague Mr. Atkinson that the appeal was still pending. He replied that he was not concerned whether the matter was or was not still pending. I turned to the learned Solicitor-General appealingly. The learned Solicitor-General said it had been entertained and decided by the Local Government Board.

In this conflict of opinion amongst eminent counsel I have to turn to the documents. Let us see what these are. Mr. Battersby, Secretary to the Citizen's Committee on the 24th January, 1894, wrote to the Secretary of the Local Government Board, asking for information as regards the auditor's report, as to the disallowances, and various other matters; and, on the 29th January, the Local Government Board wrote to Mr. Battersby, making, amongst other statements, the following:—

"The auditor, on reconsideration, has decided not to enforce the disallowances, and consequently it has become unnecessary for the Board to take the steps in the matter indicated by section 12 of the Local Government Act of 1871."

The Solicitor-General, on behalf of the Local Government Board, said that the appeal was decided by the Local Government Board; but the Local Government Board themselves here say that "it is unnecessary to take the steps indicated in section 12 of the Act."

Mr. Goddard then, on behalf of Mr. Bridgeman, writes to Mr. Drury the following letter:—

Q. B. Div. 1894.

THE QUEEN v. DRURY.

Sir P. O'Brien, C.J.

"52, MERRION-SQUARE, E., DUBLIN,
"29*th January*, 1894.

"SIR,—I am instructed by Mr. Joseph Bridgeman of 82 Summer-hill, a ratepayer of this city, to inform you that the Local Government Board has stated through their Secretary, Dr. Mooney, in reply to a query sent them by another ratepayer, relative to the surcharges put by you on the accounts of the Corporation of Dublin for the year 1892, that 'The auditor, on reconsideration, has decided not to enforce the disallowances, and consequently it has become unnecessary for the Board to take the steps in the matter indicated by sect. 12 of the Local Government Board (Ireland) Act, 1871.'

"Will you be good enough to inform me if this statement is entirely accurate? I assume, of course, that it is, but I am advised by counsel to request your distinct reply; inasmuch as I am instructed by Mr. Bridgeman, if you have so determined, to forthwith institute proceedings to compel you to perform your duty under the Acts which set forth same. I must request a reply on or before Wednesday morning, 31st instant, failing which I must proceed without further notice, as I may be advised.

I am, Sir,
Your obedient Servant,
NORRIS GODDARD.

"JAMES W. DRURY, ESQ.,
Government Auditor,
The Willows, Terenure, Co. Dublin."

Mr. Drury sends the following laconic reply:—

"30*th January*, 1893.

"SIR,—In reply to your letter of 29th instant, duly to hand, I have the honour to inform you that I have nothing to add to the extract from the letter of the Secretary of the Local Government Board which you quote.

I am, Sir,
Your obedient Servant,
JAMES W. DRURY, *Auditor*.

"NORRIS GODDARD, ESQ.,
52, Merrion-square."

These are the replies of the Local Government Board and of Mr Drury; yet it is gravely argued here that the matter has been decided by the Local Government Board. Further observation as to the matter having been decided by the Local Government Board is unnecessary. No doubt the Local Government Board may have followed a course which, it was said, was adopted before the

Act of 1871; they may have suggested to the auditor that he should not enforce the disallowance, but whatever the general practice was before the Act of 1871, once the auditor has made his allowance or disallowance, the only way to question it is by the proceedings indicated by the 12th section of that Act, that is to say, by *certiorari* or appeal. In my opinion this Court would, under the circumstances, be in a very sorry position if it could not grant the application for the writ of *mandamus* in respect of this disallowance, though I confess that, owing to the dissent of my brother Johnson, I have not on this matter the same clear opinion that I have on the other questions in the case.

The majority of the Court being of opinion that the *mandamus* must go, this disposes of the whole case, with the exception of the costs of the application. Upon the question of costs the Act of Parliament says (section 12) :—

"They may also, if they see fit, by order of the Court, direct the costs of the person prosecuting such *certiorari* to be paid out of rates which the governing body have power to make, as to such Court may seem fit."

What reason is there why we should not make the order in favour of Mr. Bridgeman? I think that he has done a great public good by coming here. He was specially aggrieved; he has been successful upon two of the items, the floral decorations and the luncheon, and also as regards a portion of the travelling expenses; and, until he came into Court, he really did not know how this matter of the extra expense of the supper-room stood; for it was only by reference to the breviates that it appeared that this expenditure had been adopted by the Corporation. I must quote here what Lord Ellenborough said in *Rex.* v. *Inhabitants of Taunton St. Mary's* (1) :—

"It is extremely beneficial to the public that these laws shall be enforced, and that the subjects should be encouraged in enforcing them whenever they bring themselves under the description of the statute of an officer or party grieved, by obtaining an indemnity from the costs."

Mutatis mutandis the observation applies to the present case.

(1) 3 M. & S. 472.

Q. B. Div. 1894. THE QUEEN v. DRURY.

We shall, therefore, make the necessary order under section 12, that Mr. Bridgeman do get his costs, together with the necessary order that the payments which were wrongly allowed should be made by the persons who ought to repay the same to the person entitled thereto, and we shall award the writ of *mandamus* as regards the disallowance. We shall settle the formal order or rule.

O'BRIEN, J.;—

We are only concerned, as I consider, upon this motion with the action of the Local Government Board, in so far as it can be said to be a bar to our proceeding, by reason of the matter having been determined by them. But it is quite certain they have not, to leave out other arguments, determined it; for they say it is not necessary to take the course indicated in the 12th section, under which alone they could act in the matter; and it is therefore consistent with their proceeding that the reasons of the auditor were either lawful or unlawful. There is no doubt real ground for the construction that, in consequence of what they did, they intended the matter to be at an end; and, if virtually disposing of the matter in the way they have been in the habit of doing were to be a bar, I would consider that to be the necessary result of their proceedings. But, so far as regards the right of this Court to enter upon the matter, they must be taken to have done nothing. At one stage of the discussion there was some reason to regard the action of the Board as a much more serious matter than that of the Corporation, as amounting to a dangerous pretension on their part to intercept the operation of the law, such as never can be conceded to any one or any power in this country. But I consider that the arguments of the learned Solicitor-General and Mr. Monahan put a different complexion on the matter, and showed that the course adopted was in accordance with a practice that existed before the constitution of the present Board, and for which they are not responsible—a practice that was carried into the system of municipal government from the Poor Law administration, through the identity of the same officer, the auditor, and under the same President, without any heed having been taken of the different regulations applicable to the extension of the audit to

towns, and with many reasons of convenience that would naturally lead to such a course, in the dispensation with obstructive conditions, such as a party aggrieved, an application to state the reasons, the statement of them in the certificate, and a formal order, ending, nevertheless, in a substantial though informal judgment. Mr. Monahan was able to refer to not less than twenty-nine instances since the Act of 1871 passed, in which objections to the auditor's rulings were disposed of in the same way. We have really nothing to do with the Local Government Board except to see whether they pronounced a judgment that would oust the interference of this Court. And in reference to any more general criticism of their proceedings, it must now at the end of the discussion be admitted that they have come out of it with the actual result, even if arrived at without compliance with the directions of the statute, that their inaction meets with considerable justification in the difficulty attending the question, and the deliberation that has been found necessary in arriving at a final conclusion, and the doubts that may still survive as to some points in the minds of members of the Court. But I cannot at all accede to the view to which my attention has been lately drawn, and to which the Lord Chief Justice has referred at length, that this matter can in any way be considered to be still pending before the Local Government Board. It occurs to me that this view, suggested at the last moment, would lead to the extraordinary result that the right of a person aggrieved might be hung up for an indefinite period of time by reason of there existing some appeal, not formally disposed of, to the Local Government Board, of which the applicant to this Court had no knowledge whatever. However, it is necessary to notice an observation made in the course of the argument, which approached dangerously near very delicate ground, in the assertion of some kind of departmental supremacy, which gave the Board a right to interfere with the auditor. The Court put its finger at once upon the suggestion of such a highly critical pretension. There is no foundation for it. The auditor is as independent as the Board; the whole value of his office consists in his independence. The departmental idea cannot prevail against the command of the statute law. The statute lays down distinctly what the auditor is to do. He allows or disallows. He

Q. B. Div. 1894.

THE QUEEN v. DRURY.

O'Brien, J.

gives his reasons in writing. With those reasons, the matter passes absolutely from his hands. They are unalterable. They are the matter of which the Board must judge, and which he must make as a return to a *certiorari*. They are therefore to be given once and finally, and no one can possess any power to meddle with them. And to do the auditor justice—for some injustice resulted in the discussion from accepting, as his own admission, the statement of the part attributed to him by others—he himself did exhibit, and Mr. Atkinson on his behalf, a certain stiffness and tenacity of his opinion, and a want of accommodating facility in modifying his views, which denoted a just appreciation of his position.

Now, so far as the application is concerned with the sums of £1000 expended on the new structure, and £120, the architect's fees, I think I may say that this part of the case died off early in the argument, under perfect proof of repeated sanction and acquiescence by the Corporation—which was the point on which they were disputed. I think I am entitled to say also that it is no less clearly the opinion of all the members of the Court that the charges for floral decorations, and for the visit to the Waterworks, outside the travelling expenses of the members of the Committee alone, are both illegal, and that the decision of the auditor as to the former was wrong, and as to the latter was right. And the question that remains, as it appears to me, settles down to two points—first, whether a person in the position of the applicant is entitled to a *certiorari*—whether he is a party aggrieved within the meaning of the statute; and, secondly, whether there is any bar to the application from what has happened in past times, in accordance with the principle which was acted upon in the case of *The Queen* v. *The Justices of Roscommon* (1). I take it to be settled that it is not possible now to deny the general proposition so constantly asserted, even in the instances in which it was not applied, that *certiorari* is not a matter of right. The earliest case in which I have found the principle laid down is that of *Arthur* v. *Commissioners of Sewers* (2) where, however, it was merely the statement of one of the Judges, and where, even in his opinion, the rule is

(1) 12 L. R. Ir. 331. (2) 8 Mod. 331.

subject to the exception, that the party has another remedy. That was a case where a person disputed his removal from office, and notwithstanding the statement of the general principle, he was twice declared entitled to the *certiorari*. In a multitude of instances, the discretion of the Court will be found to be asserted, though in the result it was not exercised.

The Queen v. *The Justices of Surrey* (1) is the first case, so far as I know, in which the distinction was drawn between one of the public, and a person specially aggrieved, and in future time the question may have to be considered whether that is a determining distinction, and it is somewhat opposed to the view which was taken in the case of the *County Mayo Presentments* (2), where one of the public was held to stand in a more favourable position than a person having an individual interest, with reference to the objection on the ground of delay. But, taking it that such a distinction exists in law, and that a person must be specially aggrieved to be entitled as of right to *certiorari*, I am clearly of opinion that a ratepayer who shares in the burthen of an illegal payment comes within that description. There is no other person who can question the illegality, for it is not the party to whom the payment is made. But I think this point is conclusively determined by the statute law, so that it is not necessary to make it out by authority. For the Municipal Corporations Act (3 & 4 Vict. c. 108), s. 130, says that, "whereas it is expedient to give all persons interested in the borough funds of any borough a more direct and easy remedy for any misapplication of such funds, be it therefore enacted that any order of council, or commissioners of any borough for the payment of any sum of money, from or out of the borough funds of any such borough, may be removed into the Court of Queen's Bench by writ of *certiorari*, to be moved for according to the usual practice of the said Court with respect to writs of *certiorari*, and that such order may be disallowed or confirmed upon motion and hearing, with costs, according to the judgment and discretion of said Court." So that, while the words still preserve the discretion, so as to prevent the right being absolute, they most clearly fix the right to apply in the person who pays rates. The English Act

(1) L. R. 5 Q. B. 466. (2) 14 Ir. C. L. R. 392.

Q. B. Div. 1894.

THE QUEEN v. DRURY.

O'Brien, J.

contains the same provision, and was the subject of decision in *The Queen* v. *Prest* (1), where Lord Campbell calls it a "most salutary enactment," which, of course, it could not be, if there were no one to make use of it, though he lays down that the words of the statute still subject both the matter of the application, and the costs, to the discretion of the Court. Therefore I consider it certain that the person who is nominally the applicant in this case is a party aggrieved. Then the claim can only be encountered by some principle of equity, such as was used in *Reg.* (*Jephson*) v. *Justices of Roscommon* (2), to qualify the strictness of the legal right. But what was that case? The Local Government Board, having a statutory power to order relief to be given on certain conditions, and having express notice that the want of one of those conditions was objected to, made a sealed order in assumed exercise of their power, in which the condition objected to was dropped, and in that way misled the Guardians into making payments that were afterwards decided by the auditor to be illegal. But the real point of the difference is, that it was the officer of the Board himself, the auditor, who applied for an order of the Court, and that it was in reference to the identical payments as to which the mistake of his superiors was committed. Here it is a distinct person altogether who applies, and the erroneous sanction is not in reference to the payments in question, but other payments of the same kind in former years. The rate for each year is a distinct one. The class of persons who pay it may be different. And, while the mind naturally revolts from the injustice of persons being made liable for the first time for an act that they have seen committed, and allowed without objection—from something like the tyranny of *ex post facto* law—yet I cannot find any principle of law on which the ratepayer can be identified as to the relief to which he is entitled with the erroneous judgment of the public officer of the Board on a former occasion; and the result is not opposed to many analogies that occur in the exigencies of temporal justice, in which the first notice of the offence is the blow that falls upon the offender. We must not forget that part of the remedy provided by the statute consists in replacing the funds of the borough,

(1) 16 Q. B. 32. (2) 12 L. R. Ir. 331.

and the fund suffers equally by wilful act, and by innocent mistake.

I am therefore of opinion that the principle which at first alone appeared to me to afford an answer to the application cannot be availed of for that purpose; and accordingly that the applicant is entitled to a *certiorari* as to the sum of £96 17*s.*, the expense of the floral decorations, and, under the Crown rule, without a formal argument, to have the allowance quashed, and to an immediate order of the Court in accordance with the statute, directing the members of the Council by whom the payments were authorized, and whose names I assume are to be found in the auditor's report, to pay that sum into the borough fund, and that the applicant is also entitled to a *mandamus* requiring the auditor to proceed to recover the amount of the Vartry expenses, over and above the travelling expenses he has deducted, against the persons surcharged by his order.

And with respect to the part of the costs over which the Court has immediate control—that part, namely, relating to the *certiorari*—and to the costs of the *mandamus*, if the parties waive any further proceeding—though the appellant has failed as to the far larger sums objected to, and though this would be a ground for considering the question of costs in an individual claim, yet, as the claim is in the interest of the public at large, and there was no other mode of asserting it, the applicant appears to be justly entitled to the costs of the motion out of the rates of the Corporation.

With respect to the costs of the auditor, as he has not the absolute right which the statute gives him, in case his decision is maintained, yet as he is required by the Act to attend and defend his proceedings, and is entitled to costs even where his decision is reversed, unless the Court should make an order to the contrary, I cannot say that the conduct of Mr. Drury, who was represented by counsel in his own personal character, presents any reason for making an order to the contrary, and I think that the auditor therefore is entitled to costs out of the Corporation funds.

Q. B. Div. 1894.

THE QUEEN v. DRURY.

JOHNSON, J.:—

I am unable to agree with the decision of the Court in reference to the disallowances. The Local Government (Ireland) Act, 1871 (34 & 35 Vict. c. 109), prescribes (section 12) the duty of the Public Auditor in auditing accounts, and requires him to disallow and strike out all payments, charges, and allowances, made contrary to law, or which he deems to be unfounded; to surcharge the same upon the person making or authorizing the illegal payment; and to certify the same to be due from such person; and (section 13) requires him to enforce payment of the sum so certified by him, "unless there be an appeal against the decision." Section 12 further requires him, on application by any party aggrieved, to state in writing at foot of the account the reasons for his decision in respect of any disallowance, surcharge, or allowance he has made; and provides two independent and alternative modes of appealing from, and reviewing, the auditor's decision, by empowering every person aggrieved by any allowance, disallowance, or surcharge, to apply (*a*) to the Queen's Bench for a writ of *certiorari*, as Justices' orders are removed by *certiorari*, in which case the auditor must appear and defend his act, and the Queen's Bench "shall decide the particular matter of complaint set forth" in the applicant's statement, and no other; or (*b*), in lieu of applying to the Queen's Bench, to apply to the Local Government Board (1) "to inquire into and decide upon the lawfulness of the reasons stated by the auditor for such allowance, disallowance, or surcharge, and it shall thereupon be lawful for the Local Government Board to issue such order thereon as they may deem requisite for determining the question." No formal mode of proceeding on appeal or application to the Local Government Board, is provided by the statute, or promulgated by the Board.

On the 20th November last the auditor completed his audit of the Corporation accounts for the year ending 31st December, 1892, and on the 25th November he reported to the Local Government Board and Corporation, under section 18 of the Act (amongst

(1) 35 & 36 Vict. c. 69, s. 4, substitutes the L. G. Board in the room of the Chief Secretary.

other things) that he had allowed, as against the borough-rate, £880, part of £1000 expended on a new supper-room at the Mansion House, and £96 17*s.* for floral decorations for entertainments at the Mansion House; and, as against the water-rate, all the travelling expenses on the occasion of an annual inspection of the Vartry Waterworks; and that he had disallowed and surcharged £120, an architect's fee (residue of the £1000 spent on the supper-room), and £5 5*s.* for illuminating the certificate of the Freedom of the City presented to the Provost of Trinity College, both paid out of the borough-rate; and also £51 16*s.* 8*d.* for dinners and refreshments, paid out of the water-rate, on the occasion of the annual inspection of the Vartry Waterworks.

The present motion is conversant with the three items of allowance, and also the three items of disallowance and surcharge. It appears that there is in this city an association of ratepayers, whose object is to see that unnecessary or illegal rates are not levied, and that rates which are levied are properly and lawfully disbursed and applied. The secretary of this association put himself in communication with the Local Government Board in reference to the auditor's report and these disallowances; and, in reply, received a letter from the Board, through their Secretary, dated the 26th January last, stating, amongst other things, "I am to state that certain disallowances were made by the auditor in the accounts of the Corporation for the year mentioned [1892], and appeals were addressed to the Board on behalf of the persons aggrieved; the auditor, on reconsideration, has decided not to enforce the disallowances, and consequently it has become unnecessary for the Board to take the steps in the matter indicated by section 12 of the Local Government Act, 1871," that is, I apprehend, to issue a formal order turning these disallowances into allowances. Mr. Bridgeman, by whom the present proceeding is taken, is a ratepayer and burgess of the city, and rated to the borough and water-rates. Neither he nor any other ratepayer appears to have been aware of the fact that appeals had been addressed to the Local Government Board against these disallowances, and his solicitor wrote to the auditor inquiring (as he assumed it to be the fact) whether the statement in the letter of the Secretary of the Board was accurate. In reply, he was informed that the

Q. B. Div. 1894.

THE QUEEN v. DRURY.

Johnson, J.

auditor had nothing to add to the letter of the Secretary of the Board. A formal demand was then made on the auditor to enforce his surcharges, and, no reply being given, the present proceedings were instituted, on notice to the auditor of the matters complained of, and stated in Mr. Bridgeman's affidavit of the 5th February, 1894. The auditor has made an affidavit in reply, and it appears by paragraph 9 that, in the course which he has taken, the auditor has yielded to the Board in deference to their views and judgment. Affidavits have also been filed by the City Treasurer, and Town Clerk, from which it appears that, after the auditor had certified his surcharges, the Leases and Finance Committee, on behalf of their members surcharged for the payments out of the borough-rate, and the Waterworks Committee, on behalf of their members who were surcharged for the payments out of the water-rate, in writing, requested the Local Government Board that those surcharges should not be enforced. These communications the Board, as stated in the letter of their Secretary of the 26th January, treated and dealt with as appeals or applications by the parties aggrieved to the Board, under section 12, against the auditor's surcharges, and received a deputation from the Corporation in support of these appeals, with the result stated in the following letters of the Board to the respective Secretaries of these Committees:—

"LOCAL GOVERNMENT BOARD, DUBLIN,
"16*th January*, 1894.

"SIR,—With reference to your letter of the 15th November last, and your further communication of the 6th ultimo, the Local Government Board of Ireland desire to state that at the request of the deputation of members of the Corporation which waited on them on the 6th ultimo, the Board consented to treat your letter of the 15th November last as an application, under section 12 of the Local Government Board (Ireland) Act, 1871, and they have since placed themselves in communication with their auditor, Mr. Drury, on the subject of the disallowance of the sums of £120 paid to Mr. Ashlin, and of £5 5*s*. paid for the illuminating of the certificate of freedom presented to the Very Rev. the Provost of Trinity College.

With respect to both these amounts, Mr. Drury informs the Local Government Board that he will not enforce the disallowances. Mr. Drury, however, observes that this decision not to enforce the surcharge of £120 must not be taken as a precedent, and that he will feel it his duty to disallow any similar

expenditure in future which is not clearly authorized by an order of the responsible committee, and, when necessary, approved of by the Council. On the subject of the disallowance of the sum of £5 5*s.* for the illuminated certificate of freedom, Mr. Drury remarks that he has grave doubts whether this item of expenditure has legal sanction; but, upon reconsidering the subject, he thinks that as the Corporation have power to grant the freedom, he will not object to the expense incidental to their recording their act by a proper document; but he does not consider that the total outlay connected with a corporate act of this nature ought to exceed the amount he has now consented to pass.

I am, &c.,

D. J. MAC SHEEHAN,
Assistant-Secretary.

"*To* EDMUND EYRE, ESQ.,
Secretary, Finance and Leases Committee."

"LOCAL GOVERNMENT BOARD, DUBLIN,
"16*th January*, 1894.

"SIR,—The Local Government Board for Ireland desire to acquaint you that since the date of the appeal of the Waterworks Committee of the Dublin Corporation, and the interview between the Right Hon. the Lord Mayor, the Lord Mayor elect, and other members of the deputation, who favoured the Local Government Board with their presence on the 6th ult., the Board have been in communication with their auditor, Mr. Drury, on the subject of the disallowance which he felt it his duty to make at his recent audit of the accounts of the Corporation for the year ending 31st December, 1892, in connection with the expenses charged for the luncheon of the members of the Council and of the Waterworks Committee on their annual visit to the works at Roundwood, and the Board desire to state that Mr. Drury has informed them that although the legality of these charges is not free from considerable doubt, he does not intend on the present occasion to take proceedings to enforce the surcharges.

The Local Government Board wish to add, for the guidance of the Corporation, and of the Waterworks Committee, that they have been advised that the travelling and luncheon expenses must be fair and reasonable in amount, and they have intimated this to the auditor, and informed him that it will be his duty to surcharge any items of expenditure in connection with the annual visit above referred to which do not appear to him to be fair and reasonable in amount.

I am, &c.,

D. J. MAC SHEEHAN,
Assistant Secretary.

"*To the Secretary of the Waterworks Committee.*"

Q. B. Div. 1894.

THE QUEEN v. DRURY.

Johnson, J.

In these letters, and in the letter of the Board of the 26th January, the duty of the auditor, which is prescribed in imperative terms by the Local Government Act, sects. 12 and 13, appears to me to be rather misapprehended. The auditor's decision, allowing or disallowing and surcharging any payment, and certifying the illegal payment to be due from the person who made or authorized it, is in the nature of a judicial act, and conclusive, subject only to the appeal given by the Local Government Act to a person aggrieved: *Reg.* v. *Omagh Guardians* (1).

When the auditor has certified his surcharges, completed his audit of the accounts, and reported under section 18, his functions as to audits have come to an end. Section 13 then requires him, if the certified surcharge is not paid within fourteen days, to enforce it, "unless there be an appeal against his decision." The Local Government Board treated the rather irregular applications made to them as appeals under section 12, and therefore the auditor's duty under section 13 was intercepted by the appeals, and the matter passed from the auditor to the Local Government Board, whose province it then became, and was, "to inquire into and decide" the matter, and "issue such order as they might deem requisite for determining the question." If the Board issued such order, their action would not be open to review on the present application, or in this Court; and, if the Board has not yet issued any formal order, and none has been mentioned to this Court, yet their letters plainly intimate how they have resolved to determine, and substantially have determined the question; and I think it is still open to the Board, pursuant to the statute, to make up and issue, in what they have treated and dealt with as appeals or applications under the Act, formal orders of their determination of the questions—a course which would have been more regular and appropriate than the communications which they had with the auditor; but the Local Government Board is not party to the present motion, nor is their action open to review on this motion. The Board led the parties to believe and act as if there were formal appeals before them, and it would be a singular proceeding by this Court, when the Board is not a party, to say there was no appeal. If

(1) 26 L. R. Ir. 619.

the Board had declined to entertain the applications as appeals, then the persons surcharged might have individually appealed; but if they were led into the belief that their appeals were before the Board, it seems a strong measure for this Court now to pronounce that the Board and the parties were all wrong. I think the fact of appeal to one of the tribunals appointed by the statute is sufficient. If anyone complains that the appeal may be hung up for ever, the law provides the proper remedy; but that is not the present question, and therefore as to the three items of surcharge against which appeals were addressed to the Local Government Board, I think the present application for *mandamus* to compel the auditor to recover these surcharges ought not to succeed; but I offer this opinion with diffidence, because my brethren are all of a different opinion.

The three items of allowance to which the present applicant objects stand on a different footing, and as to these allowances the first question raised for decision is whether Mr. Bridgeman is a person "aggrieved" by any such "allowance" within section 12. The expression any "person aggrieved" and the kindred expressions, any "person who finds himself aggrieved," or "any person who thinks himself aggrieved," are found from early times in different statutes giving a right of appeal to such a person. They are all to be construed in reference to existing facts; but it may, I think, be taken in general that a person is aggrieved when his legal rights are directly affected by the decision of which he complains, or when he has legal ground for saying that he is "aggrieved"; and a ratepayer whose pocket is directly affected by a decision allowing the misappropriation of a rate which he is compelled to pay, or its application to purposes which are unauthorized or illegal, is a person whose legal rights are directly affected by such a decision and has legal ground for saying that he is aggrieved by it.

And it makes no difference whether he is so particularly aggrieved individually, or is one of a class so particularly aggrieved. An early, and perhaps the leading authority on this subject, is *The King* (*Kimberley and five others*) v. *Inhabitants of Taunton St. Mary's* (1). Kimberley, a constable, and the five other persons who

(1) 3 M. & S. 465.

Q. B. Div. 1894.

THE QUEEN v. DRURY.

Johnson, J.

resided near, and constantly used a highway, indicted the inhabitants of the defendant parish for non-repair of the highway. The defendants removed the indictment into the Queen's Bench by *certiorari*; it was subsequently tried, and the defendants were convicted. The 5 William & Mary, c. 11, in such a case, enacted that the Queen's Bench should give reasonable costs to the prosecutor "if he be the party grieved or injured." The question was thus directly raised whether these five persons were parties aggrieved, and it was held that they were and, as such, entitled to their costs. Lord Ellenborough, C. J., says, at p. 472:—

"Certainly a person does not answer to the character of a party grieved who is only, in common with the rest of the subjects, inconvenienced by the nuisance; but here it appears that these persons have, by reason of their local situation, a grievance of their own. For, living in the neighbourhood, and having been in the constant habit of passing to and fro on this highway, they have been obliged to abandon it and take a more circuitous route to and from the nearest market-town and their habitations, which is a peculiar personal grievance beyond that which affects the public at large."

The same principle was adopted and acted on in *Reg.* v. *Justices of Surrey* (1), and in that case Blackburn, J., in delivering the judgment of the Court, points out that, in the passage read by the Chief Justice in *The Queen* v. *Lord Newborough and others* (2), the application was refused because, in the events which had happened, the matter was conclusively determined by the statute. In that case, therefore, no object could have been effected by granting the writ and quashing the order which had been conclusively acted on, and the matter closed. In *The Queen* (*M'Evoy*) v. *The Corporation of Dublin* (3) it was held that *certiorari* lay on the application of a ratepayer to bring up and quash an illegal borough-rate. I therefore think that if a public auditor decides to allow, and does allow, out of the borough-rate and water-rate, or either of them, as legal, payments which are illegal, a ratepayer of both or either of these rates is a "person aggrieved by such allowance," and as such expressly authorized by the Local Government Act, section 12, to apply to this Court for a writ of *certiorari* to bring up the decision of the auditor.

(1) L. R. 5 Q. B. 466. (2) L. R. 4 Q. B. 585. (3) 2 L. R. I. 371.

Then it is said that, as this Act only authorizes application to this Court in like manner and subject to like conditions as provided in respect of applications to remove Justices' orders, therefore it is discretionary with this Court to grant or withhold the writ. It is common learning that the Attorney- or Solicitor-General is entitled on behalf of the Crown to the writ as of right; but in every case of a private prosecutor the Court must be satisfied that there is sufficient ground for granting the writ, and, as the Court must decide that question, the issuing of the writ is in this sense discretionary; but, when the affidavits satisfy the Court that a person's legal rights are directly and prejudicially affected by the illegal decision of an inferior tribunal, then such person is, in my opinion, entitled to the writ *ex debito justitiæ*, and as of common right, unless (which is not the present case) he has by his conduct disentitled himself, or unless no legitimate object is to be accomplished by issuing the writ.

The next question is, are sufficient grounds shown by the affidavits now before the Court for issuing the writ of *certiorari* in the present case? The first allowance objected to is the £1000 spent on the new supper-room. As to £880 (part of this sum), this Court is called on to bring up the auditor's decision by *certiorari*, £120 (the remainder of the £1000) being included in the appeal to the Local Government Board against the auditor's disallowances and surcharges. It appears that the Leases and Finance Committee expended this sum on the addition to the Mansion House of a new supper-room out of the borough-rate without the previous authority of the Municipal Council. Stated in this bald way, this expenditure was *ultra vires* and illegal; however, it now appears by the affidavits that this money was not expended in one sum, but in several sums from time to time; that each sum expended was brought before the Municipal Council in the quarterly breviates of expenditure, and adopted by the council; and that the auditor before he decided to make this allowance went over the account with the Borough Surveyor, and satisfied himself that the work was value for the whole amount expended on it. These facts, however, appear for the first time by the affidavits in this application, and were not previously made known to the ratepayers. The Municipal Council had authority to order the construction of this structural

Q. B. Div. 1894.

THE QUEEN v. DRURY.

Johnson, J.

addition to the Mansion House; they have taken over the supper-room, with knowledge of all the expenditure objected to. It is full value for the money; and I therefore think this item falls within the principle of *Reg.* v. *Prest* (1); and that this Court is not bound and ought not to issue a writ of *certiorari* in respect of this sum. The £120 residue of this £1000 stands on entirely different grounds—but that is a matter for the Local Government Board. The next allowance objected to is £96 17*s.*, paid out of the borough-rate for floral decorations for Mansion House entertainments. This was an illegal and indefensible application of the borough-rate. The auditor's ground for deciding to make this allowance, though he considered it (and rightly so) illegal, was that similar expenditure had been allowed in former accounts of previous years: but this is no ground in law for allowing an illegal payment; it is challenged by a ratepayer, and this Court is not invested with any discretion to be benevolent at the ratepayer's expense. The decision of this Court in *Reg.* (*M'Evoy*) v. *The Corporation of Dublin* (2), that gas consumed at the Mansion House could not be charged against the borough-rate, ought to have made those by whom that fund is disbursed careful to see that its expenditure on the Mansion House was lawful. I therefore think the writ ought to issue in reference to the auditor's decision making this allowance. The remaining allowance objected to is the travelling expenses of members of the Municipal Council, not being members of the Waterworks Committee, on the occasion of an annual inspection of the Vartry Waterworks. It appears by the affidavits, and the auditor's report, that the Waterworks Committee, besides visiting the works during the year, had been in the habit of having an annual inspection of the Vartry Waterworks, to which all the members of the Committee and their officers were summoned, and the Committee paid out of the water-rate, "the cost of conveyance, dinner, and other necessary refreshment for the members of the Committee and officers." This seems to have been a desirable excursion, and in 1892 the Public Auditor of the Corporation accounts, ending 31st December, 1891, finding that all the members of the Municipal Council, and not only the

(1) 16 Q. B. 32. (2) 2 L. R. Ir. 371.

members of the Waterworks Committee attended this inspection at the cost of the water-rate, drew attention to it in the report. The Committee thereupon took the advice of their law agent on the subject to the effect, and with the results stated by the Chief Justice.

No question arises now about guests, because "the fixed price" (whatever that may be) was paid for each guest by the member of Council who invited him; but, although the auditor disallowed the portion of the dinner refreshment bill (£51 16*s.* 8*d.*) paid out of the water-rate for the members of the Council, not being members of the Waterworks Committee (which is included in the appeal to the Local Government Board), yet he decided to allow, and did allow, the illegal payments for the travelling expenses of these members of Council not members of the Waterworks Committee; and I therefore think that the writ of *certiorari* ought to issue to remove this decision of the auditor also, and that the decisions of the auditor as to these two allowances ought to be quashed. I agree as to the costs.

MADDEN, J.:—

Upon the only point in this case in regard to which a difference of opinion exists between the members of the Court, I agree with the view expressed by my Lord Chief Justice and my brother O'Brien.

In my opinion there never was at any time an appeal pending against the decision of the auditor within the meaning of sect. 13 of the Local Government (Ireland) Act. I quite agree with what has been said by my brother Johnson to the effect that the Act of Parliament, while giving a right of appeal, prescribes no particular form in which that appeal should be taken. I am, however, clearly of opinion that the essential statutory requirements in regard to appeal must be observed; otherwise there cannot be an appeal. What are these requisites? They are included in the 12th section. It enacts that "It shall be lawful for any person aggrieved . . . to appeal to the Chief Secretary" (for whom the Local Government Board was afterwards substituted), and

Q. B. Div. 1894.

THE QUEEN v. DRURY.

Madden, J.

provides that this appeal shall deal with "the lawfulness of the reasons stated by the auditor for his allowance, disallowance, or surcharge."

Now, in the first place, I am of opinion that the Committees who applied informally to the Local Government Board were not persons aggrieved within the 12th section of the Act. These persons were, in my opinion, the individuals who were surcharged by the act of the auditor. In the second place, I can find in this case no trace of any application by any party to the Local Government Board to inquire into and decide upon the lawfulness of any reasons given by the auditor for his surcharge; therefore I do not find either of the statutory requirements of an appeal capable of operating as a bar to the action of this Court.

A certain amount of confusion and misunderstanding has been caused by a misconception on the part of the Local Government Board, possibly of long standing, in regard to the position of their auditor, when acting, not under the Poor Law statutes, but under the Act which we have now before us for consideration. The Legislature, when providing for the audit of the accounts of municipal bodies, adopted, as a convenient machinery, the system of audit which it found in existence—formerly under the Poor Law system—and then under the Local Government Board. But it is a mistake to suppose that the functions of the Local Government Board in regard to both classes of audit is the same. I adopt what has been said by my brother O'Brien on this subject. The Local Government Board is not a domestic forum to interfere between auditor and ratepayer; nor is it a consultative body to whom the auditor can resort for advice. The Board is substituted for the Chief Secretary as an appellate tribunal, and has now the same duty as the Chief Secretary under the Act of 1871, and that simply is to decide upon the lawfulness of reasons definitely brought before them by a party aggrieved by any decision of an auditor.

As regards the items of allowance and disallowance, my views have been so fully stated by the other members of the Court that it is unnecessary to add anything. I wish, however, to make it clear that I rest my judgment upon the statute law, and not upon

the common law as to *certiorari*. There is no difference of opinion amongst its members as to the statutory duty of this Court. We are agreed that a ratepayer is a person aggrieved within the meaning of the Act; and we are also agreed that it is the duty of this Court under the statute to intervene and to correct what appears to it to be illegality on the part of the auditor. *Reg.* v. *Justices of Surrey* (1) has been referred to. Taking the view of the statute which I have mentioned, it is unnecessary to discuss that decision in detail; but I wish to guard myself against misconception. That decision has not, in my opinion, affected the decisions as to the position of a writ of *certiorari* at common law, nor has it broken down the distinction taken, in several cases, between the rights at common law of a person coming forward to redress an individual grievance, and of one who comes forward to assert a right in which a more or less numerous class of the public are interested; whether as ratepayers, cesspayers, or otherwise. In the one case it has always been considered that the writ must issue *ex debito justitiæ*, in the same manner as process in a civil proceeding for the assertion of a private right. In the latter class of cases public considerations intervene, and accordingly it has always been held that the issue of the writ is within the discretion of the Court, a discretion to be exercised judicially and not upon capricious grounds. Although the expression "party aggrieved" occurs in *Reg.* v. *Justices of Surrey* (1), it is quite plain from the facts of that case, as well as from the judgment of Blackburn, J., that the plaintiff was treated as having an individual interest in the matter, and as coming forward to redress a private grievance. This case, therefore, does not appear to me to touch the authority of such decisions as *Reg.* v. *Newborough* (2) or of *Co. Mayo Presentments* (3), in the latter of which a valuable reading upon this branch of the law may be found in the judgments of Lefroy, C.J., and O'Brien, J. However, it is unnecessary, having regard to the view which I take of this case, and of our duty under the statute, to deal more fully with this question.

As to the costs of this application I concur in the opinion of the Court. I see no reason whatever why this useful application,

(1) L. R. 5 Q. B. 466. (2) L. R. 4 Q. B. 585. (3) 14 Ir. C. L. R. 392.

Q. B. Div. 1894.

THE QUEEN v. DRURY.

which has been successful to a considerable extent, should not be dealt with in the ordinary manner by awarding the applicant his costs.

Solicitor for the applicant: *Norris Goddard.*

Solicitors for the Local Government Board auditor: *D. & T. Fitzgerald.*

Solicitor for the Corporation: *John Mac Sheehy.*

Solicitors for the Local Government Board: *T. T. Mecredy & Son.*

A. E. R. J.

THE QUEEN (AT THE PROSECUTION OF ARTHUR ELLIS) *v.* THE JUSTICES OF THE PEACE FOR THE COUNTY OF DUBLIN (1).

Q. B. Div. 1894. Feb. 16, 23.

Summary jurisdiction—Continuing offence—Obstruction of highway—Justice—Disqualification for interest.

A person who had been convicted at Petty Sessions, in June, 1893, for obstructing the free passage of a road by "erecting" a barbed wire fence thereon, was afterwards convicted on four separate charges of obstructing, on the 7th, 14th, 21st, and 28th August, 1893, respectively, the free passage of the road, by "erecting and maintaining" a barbed wire fence thereon. The barbed wire fence was the same in both cases, the defendant not having removed it after the first conviction. It was sought to quash the later convictions, on the ground (*inter alia*) that the offences charged were identical with that for which the first conviction was had:—

Held, that the convictions were good, the obstructing on each day being a separate offence.

W., one of the Justices who adjudicated, was a member of the Finance Committee of the county of Dublin, and also a cesspayer. The complainant was the district surveyor, an officer of the Grand Jury, having a statutory duty of reporting generally on the state of all roads, and the name and description of all persons by him prosecuted for any injury to any road, or any like offence, and the result of such prosecution, and generally on all matters and things which may be given to him in charge by the Finance Committee. There was evidence that the first prosecution was undertaken by him in obedience to a direction from the Finance Committee to take steps to have the barbed wire fence removed, but that the subsequent prosecutions were undertaken by him on his own responsibility, and that W., when adjudicating in the cases, was not aware that any directions had been given to the complainant:—

Held, that W. was not disqualified, either by his being a member of the Finance Committee, as that Committee could not be considered as being directly or indirectly the prosecutors, or by his being a cesspayer, even assuming that the costs of such a prosecution were to be paid out of the county funds.

MOTION to make absolute a conditional order for a *certiorari*.

On the 13th June, 1893, Arthur Ellis appeared before the

(1) Before O'BRIEN, JOHNSON, and GIBSON, JJ.

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF CO. DUBLIN.

Justices for the county Dublin, sitting at Petty Sessions at Balbriggan, to answer a summons on the complaint of William Collen, a District Surveyor for the Northern Division of the county of Dublin, which, as amended at the hearing, charged that the defendant did in or about the month of October, 1892, unlawfully and wilfully, or by negligence or misbehaviour prevent or interrupt the free passage of persons on a certain public road or highway, to wit, the public road from Balbriggan to Drogheda, at or near Tankerstown in said district, by erecting thereon a certain barbed wire fence, and that he altered the fence of said public road or highway, without the consent of the County Surveyor, or the authority of any presentment. The magistrates made the following order:—"We convict the defendant Arthur Ellis that he did wilfully prevent and interrupt the free passage of persons on the public road from Balbriggan to Drogheda, by erecting thereon said barbed wire fence" (1).

The barbed wire fence was not removed, and subsequently four other summonses were issued by the same complainant against the defendant. The first charged that the defendant on the 7th August, 1893, at or near Tankerville, or Tankerstown, in the county of Dublin, did wilfully and negligently interrupt and prevent the free passage of persons on a certain public road, to wit, the public road from Balbriggan to Drogheda, at or near Tankerville, or Tankerstown, aforesaid, by erecting and maintaining a barbed wire fence along the said road contrary to law. The other summonses charged like offences on the 14th, 21st, and 28th August, 1893, respectively.

The summonses came on for hearing on the 19th September, 1893, at Balbriggan Petty Sessions. One of the magistrates who sat and subsequently adjudicated (Mr. Edward Hamilton Woods) was a member of the Finance Committee appointed by the Grand Jury of the county of Dublin, pursuant to the 7 & 8 Vict. c. 106, sect. 90.

(1) This summons had been before the magistrates on the 27th December, 1892. They dismissed the summons, but stated a case for the Exchequer Division. See *Collen, Appellant; Ellis, Respondent* (32 L. R. Ir. 491). By order of the Exchequer Division the case was remitted to the Justices, who made the order mentioned above.

On the application of the complainant's solicitor, the summonses were amended by inserting the word "or" between "wilfully" and "negligently."

The complainant gave evidence that the barbed wire fence was on that day (the 19th September, 1893) in the same position and condition as it had been in the month of October, 1892. He had not seen it on either the 7th, 14th, 21st, or 28th August. In his opinion it was calculated to interfere with free passage along the pathway.

Counsel for the defendant objected that the offences charged were identical with that for which defendant had been convicted on the 13th June, 1893; but the magistrates decided against the objection, and convicted the defendant on each summons, imposing four several fines of ten shillings, with costs to the prosecutor.

The conditional order stated, as grounds for the *certiorari*, that the convictions were made without and in excess of jurisdiction; that jurisdiction was ousted by reason of the previous conviction; and that one of the Justices who took part in the adjudication, to wit, Edward Hamilton Woods, Esq., was interested in the prosecution and adjudication as one of the persons or members constituting the Finance Committee of the county of Dublin, by whom the said complaint was prosecuted.

Cause was shown by an affidavit of W. Collen, the complainant, filed 15th December, 1893. He stated that on the 4th November, 1892, he had informed the Finance Committee of the erection of the fence by Mr. Ellis, and that the Committee had authorized him to take any action that might be necessary to compel the fence to be removed. Mr. Edward Hamilton Woods was not present at this meeting of the Committee. The first summons on which the order of the 13th June, 1893, was ultimately made was served in December, 1892.

Mr. Collen then stated that after the conviction of the 13th June, 1893, as he found Mr. Ellis had taken no steps to have said fence removed, he, acting on his own judgment, and without receiving any instructions from the Finance Committee, or any member thereof, but considering it was his duty as District Surveyor to have the fence removed, caused the summonses to be

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF CO. DUBLIN.

issued against the defendant, which came on for hearing on the 19th September, 1893. Mr. Woods made an affidavit in which he stated that when he acted as Justice in the matter he was not aware that any directions had been given to Mr. Collen by the Finance Committee.

Ronan, Q.C. (with him *W. P. Ball*), for Mr. Ellis, in support of the motion:—

The "erecting" of the wire fence was the same act as that for which Mr. Ellis had already been convicted, and the "maintaining" charged in addition was no separate act; the defendant has, therefore, been twice convicted of the same offence.

Secondly, Mr. Woods was disqualified by reason of interest. Under the 7 & 8 Vict. c. 106 (Dublin Grand Jury Act), sect. 8, the District Surveyor was bound to report generally to the Finance Committee on the state of all roads, and the name of any person prosecuted by him. In the discharge of this duty he did actually report to, and was acting under, the authority of the Finance Committee. A Justice who is a member of a society or body who are prosecuting is disqualified: *Reg.* v. *Allan* (1); *Leeson* v. *General Council of Medical Education* (2); *Reg.* v. *Milledge* (3); *Reg.* v. *Handsley* (4); *Reg.* v. *Great Yarmouth* (5); *Reg.* v. *Gaisford* (6); *Guardians of Mitchelstown Union* v. *Duffy* (7). Moreover, Mr. Woods was interested as being a cesspayer. By section 90 of the Dublin Grand Jury Act, a member of the Finance Committee must have a £50 qualification. If the summonses had been dismissed, the District Surveyor's costs should have been certified by the Finance Committee, and should have been presented for by the Grand Jury, and paid out of county funds to which Mr. Woods was liable to contribute.

It is not actual bias, but the possibility of bias, that we allege here; and we submit that such a possibility is by law a disqualification.

(1) 4 B. & S. 915.
(2) 43 Ch. Div. 366.
(3) 4 Q. B. Div. 332.
(4) 8 Q. B. Div. 383.
(5) 8 Q. B. Div. 525.
(6) [1892] 1 Q. B. 381.
(7) 28 I. L. T. R. 20.

Campbell, Q.C., and *Jefferson*, for the Justices:—

The offence charged was not the erecting, or the erecting and maintaining of the wire fence; it was the obstructing of the free passage of persons on the road; every day that the defendant permitted the fence to remain, he committed a new offence of obstruction: *Reg.* v. *Waterhouse* (1). It is analogous to a continuing trespass.

As to the question of interest, the facts show that the complainant was not prosecuting under the direction of the Finance Committee, but on his own responsibility.

A mere possibility of bias in a magistrate does not *ipso facto* avoid a decision in which he has taken part. It is necessary in addition to show that the bias is real: *Reg.* v. *Handsley* (2); *Reg.* v. *Justices of Huntington* (3); *Reg.* v. *Meyer* (4); *Reg.* v. *Rand* (5); *Reg.* v. *Mayor and Justices of Deal* (6); *Reg.* v. *Alcock* (7).

W. P. Ball, in reply:—

By section 96 of the Dublin Grand Jury Act, the members of the Finance Committee may be personally made to pay the costs of a prosecution by surcharging them with the amount.

Reg. v. *Handsley* (2) is distinguishable, for in that case the members of the Town Council were by statute enabled to adjudicate in cases where the council prosecuted. It is only in such cases that it is necessary to show affirmatively that there is bias; in all other cases it is presumed, when the Justice is a member of the prosecuting body.

Cur. adv. vult.

Feb. 23.

O'BRIEN, J.:—

A conviction before magistrates has been questioned on two grounds—first, that there was a previous conviction for the same offence, and second, that one of the magistrates was interested either in the sense of pecuniary interest or as having a part in the prosecution. It is not, perhaps, quite in accordance with the ordinary use and theory of *certiorari* that the fact of a previous

(1) L. R. 7 Q. B. 545.
(2) 8 Q. B. Div. 383.
(3) 4 Q. B. Div. 522.
(4) 1 Q. B. Div. 173.
(5) L. R. 1 Q. B. 230.
(6) 45 L. T. (N. S.) 439.
(7) 37 L. T. (N. S.) 829.

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF Co. DUBLIN.

O'Brien, J.

conviction should be the subject of such an application; but as the matter is such as, if it exists, takes away the jurisdiction altogether, it comes within the class of cases in which evidence is allowed to show an extrinsic objection of that kind. The summons was for wilfully or negligently obstructing a public road, by erecting and maintaining a certain fence; and the defendant had already been summoned and convicted when the fence was first erected. But since the times at which the offence was alleged to have been committed were different, and the defendant, in fact, was certainly convicted for keeping up the fence, it did appear to some members of the Court that to erect and maintain was a proper legal description of the offence of maintaining, as breaking and entering is the legal mode of describing a trespass by entering, and that there is a continued erection by the person who maintains; besides that the legal offence is the obstruction of the road, and erecting and maintaining the fence are merely the means.

The other point—the constitution of the tribunal—is the one that occupied most of the argument, and is not quite so easily disposed of. The finance committee of the Dublin Grand Jury is a continuing body, and Mr. Woods, the magistrate whose part in the decision is objected to, is a member of that body. He certainly was not present when the matter was brought under the notice of the committee, or when any proceeding was directed by them. In fact, the prosecution in the present instance was not ordered at all by them. What happened was, that the county surveyor, whose duty it is to inform the committee of matters connected with the highways in the county, but who is not required to take their directions for legal proceedings, and, on the contrary, has that authority himself, and is only required to report the result, brought before the committee the fact of the annoyance and obstruction caused by Mr. Ellis's barbed wire fence, and was directed in general terms to take such steps as were necessary, and to keep the matter under his notice. The result was that Mr. Ellis was prosecuted for erecting the fence, and after a former application to the Exchequer Division, was convicted; and then, having insisted upon keeping up this nuisance, after repeated remonstrances, was summoned, in the present instance, by the

County Surveyor, most certainly upon his own motion, and following an emphatic expression of opinion in the Exchequer Division as to what was his duty. Now, though Mr. Woods was not present at the committee, and did not know of any direction by them, I could not so surrender common sense to formal reasoning as not to come to the conclusion that this would be commonly understood to be a prosecution by the Grand Jury, or by the finance committee, in which conclusion the fact that the solicitor for the Grand Jury acted for the County Surveyor, in the correspondence and the proceedings, could not be without a certain influence on my mind. And if I were to be tried, I cannot say that I would like to have a member of the finance committee on the Bench. But is the feeling of the defendant the true test of the question, or can *esprit de corps* be the same thing as the bias or interest that will disqualify a magistrate, or must we satisfy the outside public by the proverbial solicitude for the honour of Cæsar's wife, which is not yet quite hunted from the language of legal decision. The old statement of the rule was that a man could not be judge in his own cause. The "cause" applies both to interest and bias, and the bias is sometimes confounded with the influence arising from interest, and sometimes exists without any interest where the Justice is a party to the prosecution. Let us take the case of interest first. What is the interest? The risk of the costs which would, perhaps, be measured at a guinea, if the finance committee had to bear them, or the interest arising from addition to the rates, which would be caused by the diffusion of that amount through the whole community. Are we constrained by any of the cases to refine away our common sense to such a point? In *The Queen* v. *Allan* (1) the convicting Justice was a member of a fishery association, which included riparian proprietors, and was himself a riparian proprietor. The case of *The Justices of Yarmouth* (2) was an appeal against rates, and the Justice was himself the appellant in one of the cases, which involved the same question as the rest, and joined in the decision reducing the assessments. That was clearly acting in his own case. In *Reg.* v. *Meyer* (3),

(1) 4 B. & S. 915. (2) 8 Q. B. Div. 525. (3) 1 Q. B. Div. 173.

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF CO. DUBLIN.

O'Brien, J.

the Justice, who was the chairman of a local Board of Health was, says Blackburn, J., "sitting as Judge in an information arising out of a matter in which he was himself the defendant." And in *Reg.* v. *Justices of Huntington* (1), in which it was held that members of a corporation who had issued notices under the Dogs Act were entitled to sit as Justices on the hearing of a summons for breach of the regulations, Lord Denman says expressly that *The Queen* v. *Meyer* (2) was decided on the ground that the Justice was practically and really a party to the proceedings.

The Justices who sat in *Reg.* v. *Milledge* (3) were members of a town council which had ordered a prosecution under the Sanitary Acts, and in that case the conviction was quashed. Even with the distinction that their presence was expressly objected to, it is not easy to reconcile this case with *The Queen* v. *Handsley* (4) by the observations of Cave, J., that "it was obvious that the Justices were substantially interested in the proceeding adjudicated upon, so as to be likely to have a real bias in the matter." The decision in *The Queen* v. *Handsley* (4) could not have been put on the section of the statute, that the Justice should not be disqualified by the fact of his being a member of the corporation, for the same provision existed in the *Queen* v. *Milledge* (3), in which, nevertheless, he was held disqualified; and it is difficult to see what influence upon the question we are to ascribe to the statutory privilege, except to prevent the mere nominal interest arising from membership of the public body from being a disqualification, when it is held, notwithstanding, as it was in *The Queen* v. *Handsley* (4), that "the Justice must have a substantial interest in the result of the hearing, so as to make it likely that he has a real bias in the matter." If substantial interest shall be the test, notwithstanding the privilege, are we to adopt the distinction that it is not the test where a statute does not give the privilege? And if the effect of the privilege be to take away the disability arising from the Justice being a member of the body which is the prosecutor, that is in direct conflict with the decision in the *Queen* v. *Milledge* (3) which is undoubtedly

(1) 4 Q. B. Div. 522.
(2) 1 Q. B. Div. 173.
(3) 4 Q. B. Div. 332.
(4) 8 Q. B. Div. 383.

an authority that the mere naked relation of the Justice to the prosecuting body is sufficient to vitiate the conviction. However, there is another important case, *The Queen* v. *Pettitmangin* (1), which was referred to in *The Queen* v. *Allan* (2), and was decided by the same Judges that decided that case and also *The Queen* v. *Milledge* (3), and comes nearer to the present case than any other, in the fact that the prosecution was not the result of any immediate direction. In that case the Watch Committee of Liverpool had given a general direction concerning breaches of the licensing law, in consequence of which a publican was summoned by the inspector of police, and it was held that a member of the Committee was not disqualified from acting as a Justice. From the fact that Chief Justice Cockburn, when the case was mentioned, asked was not the Justice interested in the result as to the costs, he could not be considered, at least, as having given it any new sanction. However, I consider that consistently with the rule in *The Queen* v. *Milledge* (3), the present case must be rested upon the special grounds—that the County Surveyor is himself the person charged by the statute with the duty of taking care of the public roads—that he is not required to seek any direction for prosecutions from the Finance Committee—that he is required specifically to report only the result of proceedings—that the direction in this case was generally to take such steps as were necessary—that the prosecution was in his own name, and that he was the party liable to the costs—that in fact the evidence is that it was entirely on his own authority —and the further proof that it was consequent upon a statement from the Bench as to what was his official duty, and that Mr. Woods states he was not present, and never even heard of the matter before the Finance Committee. Having regard to these circumstances, the necessary link between him and the Finance Committee as to the authority for the proceedings is wanting; and the decided cases—on which alone a magistrate could be required to abstain from taking part in his ordinary duty—do not appear to me to afford any warrant for holding, under these particular facts, that because the outside public would

(1) 9 L. T. (N. S.) 683. (2) 4 B. & S. 915. (3) 4 Q. B. Div. 332.

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF CO. DUBLIN.

O'Brien, J.

in substance identify the prosecution with the Finance Committee, and thereby attribute to him a bias, which must be a thing existing in his own mind, and not in the idea of others, that that would be a sufficient ground for avoiding the conviction. I am therefore of opinion that no case is established for a *certiorari*.

JOHNSON, J. :—

By four several convictions the prosecutor, A. Ellis, was convicted of wilfully interrupting the free passage on a public road on the 7th, 14th, 21st, and 28th August, 1893. It is objected to each of these convictions that it is bad on its face, because a single penalty is awarded for several distinct offences. The statute (1) enacts that "any person who shall in any manner wilfully or by negligence or misbehaviour prevent or interrupt the free passage of any person or carriage on any public road . . . shall be liable to a fine not exceeding 20*s*." Inasmuch as it is thus made an offence "*in any manner* wilfully" to interrupt the free passage of the public road the summons and conviction ought to state the manner or means by which the interruption was effected, in order that the defendant may be apprised of the particulars of the complaint which is alleged against him. Accordingly, in this case each summons, and consequently each conviction, shows that the defendant wilfully prevented and interrupted the free passage of persons on the public road "by erecting and maintaining a barbed-wire fence." This is the manner and these are the means by which the prevention and interruption of the free passage was effected, and the statutable offence was committed, and for this single offence the defendant was convicted in a single penalty; and this ground of objection therefore fails.

Next it is objected that Mr. Ellis was convicted on the 13th June, 1893, of the same offence for which he was convicted by the several convictions now impeached, and that his defence of *autrefois convict* was improperly overruled by the magistrates. A defence of this kind is a mixed question of law and fact—mainly of fact. The proceedings which led to the former conviction are reported in *Collen, Appellant; Ellis, Respondent* (2), in

(1) 14 & 15 Vict. c. 92, s. 13, sub-s. 3. (2) 32 L. R. Ir. 491.

the Exchequer Division. The result of that decision was that the magistrates, on the 13th June, 1893, convicted Ellis of wilfully preventing and interrupting the free passage of the public road in October, 1892, by erecting a certain barbed-wire fence; and by the several convictions now challenged, the magistrates convicted Ellis "that he did wilfully prevent and interrupt the free passage of persons on the public road from, &c., by erecting and maintaining a barbed-wire fence," on the day mentioned in each conviction, being distinct days in four several weeks in August, 1893. On each of these four occasions the free passage of the road was interrupted by the erecting and maintaining of the same barbed-wire, and at the same place as it was interrupted in Oct., 1892. But the wilful obstruction of a highway is a continuing nuisance every day that it is maintained; and every continuance of a nuisance is, in law, itself a nuisance; therefore it is that a person who obstructs a highway by erecting a fence commits a nuisance for which he may be indicted and convicted; and if that erection is still maintained by him he may be again indicted and convicted for the continuance of the nuisance, and the earlier conviction is no answer to the subsequent indictment for what in law is a distinct nuisance. It makes no difference that the nuisance is summarily punishable, and this ground of objection therefore also fails.

Then it is objected that the bench of magistrates by which Mr. Ellis was convicted was improperly constituted because this was a presented road, and Mr. Woods, one of the members of the bench, was disqualified by interest—first, by being a member of the Finance Committee of the Grand Jury of the county of Dublin, and, secondly, by being liable to the payment of the county cess of the county of Dublin. This Finance Committee is appointed by the Grand Jury, under the 7 & 8 Vict. c. 106, sect. 90, yearly at Easter. Its duties are prescribed by sects. 91 to 96, and consist principally of making orders for payment to persons entitled under previous presentments of the Grand Jury. It has no authority beyond that conferred by the statute, and it cannot order or sanction prosecutions, or pay or undertake to pay costs of prosecutions. Every District Surveyor of the county is appointed by the Grand Jury, under sect. 7 of the same Act

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF CO. DUBLIN.

Johnson, J.

(amended by 25 & 26 Vict. c. 106), and his duties are prescribed by sect. 8. He is an independent officer of the Grand Jury.

The nuisance caused by this barbed-wire fence was created by Mr. Ellis (who, in his affidavits, describes himself as a "J.P.") in October, 1892. He refused to abate it when required to do so by Mr. Collen, the District County Surveyor, who states that on the 4th November, 1892, he reported the matter to the Finance Committee. He was under no obligation to do so, but possibly considered it due to Mr. Ellis as a magistrate and a person of position in the county.

The Finance Committee requested the District County Surveyor to put before Mr. Ellis his untenable position in refusing to abate this nuisance, and "to take any action that might be necessary in regard to it." Mr. Woods was not present at that meeting of the Finance Committee. Mr. Ellis was summoned by Mr. Collen, the District County Surveyor, under the 14 & 15 Vict. c. 92, sect. 13, sub-sect. 3, for this nuisance. The magistrates, however, conceiving that a question of title was involved, dismissed the summons, but stated the case on which the Exchequer Division decided that the alleged question of title was not relevant, and remitted the case to the magistrates, who, on the 13th June, 1893, convicted Mr. Ellis of the wilful interruption of the road in October, 1892 (1).

Murphy, J., in his judgment (2), indicates very plainly the duty of the District County Surveyor under the circumstances; and as Mr. Ellis persisted in continuing the interruption of the free passage of the road, Mr. Collen, as he states, in the discharge of his duty as District County Surveyor, on his own judgment and responsibility, having regard (as he was bound) to the judgment of the Exchequer Division, and without reference to the Finance Committee, or anyone else, summoned Mr. Ellis for the four several offences for which the convictions now impeached were made.

Mr. Woods was a member of the bench before which these convictions were had. He had not been present at the meeting of the Finance Committee on the 4th November, 1892, and in his affidavit he states:—"I never took any part, directly or indirectly,

(1) *Collen* v. *Ellis*, 32 L. R. Ir. 491. (2) *Ibid.* 503.

with regard to the institution or prosecution of proceedings against Mr. Ellis in respect of the barbed-wire fence, and I was not interested in any way in the proceedings, nor was I aware at the time I acted as Justice in this matter that any directions in reference to said proceedings had been given by the Finance Committee to Mr. Collen."

I am satisfied, on the evidence before the Court, that in these prosecutions, which resulted in the convictions now challenged, the District County Surveyor acted independently, on his own responsibility, and in deference to the decision of the Exchequer Division; that the Finance Committee had nothing whatever to say to the matter; and that in these circumstances Mr. Woods was not, by being a member of the Finance Committee, in any way disqualified from acting as a magistrate on the occasion in question. Therefore the authorities relied on to establish the well-settled and most wholesome principle in the administration of justice by every tribunal, that a person cannot at the same time act as accuser and judge, have no application to the facts of this case. This ground of objection therefore also fails.

Then it is objected that Mr. Woods was disqualified as a magistrate because he was himself liable to the payment of Grand Jury cess, which is levied for the county at large, as well as for the baronies of the county, and that if the costs of the prosecutions had not been awarded against Mr. Ellis they would have been paid or recouped to Mr. Collen by the Grand Jury out of the county cess, which, therefore, might have been relieved to this extent by giving the costs against Mr. Ellis. I have stated that I am satisfied on the evidence that the District County Surveyor instituted and carried through the prosecutions in which these convictions were had of his own motion, and on his own responsibility. Having succeeded, he was entitled, under the Petty Sessions Act, to his costs. But, to put an end to the matter, he offered to forego costs if Mr. Ellis, even then, would undertake to abate the nuisance; and as this was refused Mr. Collen, being put at arm's length, insisted on his costs, and got them. Whether, if he had not succeeded, the Grand Jury would or would not have indemnified him there is no evidence to show, and for my part I decline to speculate about it. This objection, therefore, also fails.

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF Co. DUBLIN.

Johnson, J.

It is to be observed that by the Grand Jury Act (7 & 8 Vict. c. 106, sect. 101) for the county of Dublin, and the general Grand Jury Act for the rest of Ireland (6 & 7 Wm. 4, c. 116, sect. 152), the county cess is made recoverable before a Justice or Justices of the county; and as every county magistrate, presumably, is liable to the payment of the county cess, if this liability is to disqualify the magistrate from acting as a magistrate in summary proceedings to recover the county cess on account of pecuniary interest, every county magistrate is disqualified, and the statutes nullified. Pressed to its logical conclusion, this principle would disqualify every magistrate in Ireland, liable to payment of income tax, from acting as a magistrate in summary proceedings for the recovery of income tax under the Income Tax Act (16 & 17 Vict. c. 34, sect. 17).

In my opinion all the objections fail, and the conditional order must be discharged, with costs.

Henceforth the Barbed Wire Act, 1893 (56 & 57 Vict. c. 32), will give an effectual and simple remedy.

GIBSON, J.:—

The first objection brought against the conviction is founded on the supposed identity of the subject-matter of the second conviction with that of the previous conviction in June, and not on any want or defect of proof as to the offences charged. This is the ground relied upon in the conditional order, and it clearly fails. The defence of *autrefois convict* cannot apply where the offence mentioned in the second summons is charged to have been committed in August, when the offence covered by the previous conviction took place in June.

The second and material objection principally argued was based on the fact that Mr. Woods, who was a member of the Finance Committee of the Grand Jury, took part in the decision. On behalf of Mr. Ellis it was contended (*a*) that, upon the evidence, the Finance Committee were really prosecuting through the County Surveyor; (*b*) that there was a possibility of bias in consequence of the relations existing between the prosecutor and the Finance Committee; (*c*) that Mr. Woods had a pecuniary interest in the result. The legal principles applicable to the question are free

from doubt, but the difficulty arises in applying them or defining their operation. Unquestionably, if Mr. Woods could be regarded as the principal of Mr. Collen in the prosecution, or if there was a reasonable likelihood of bias, or if there was any direct pecuniary interest, however trifling, the conviction must be quashed. The question (as pointed out by Bowen, L. J., in *Leeson's Case* (1), at p. 384) must be treated as one of substance and fact in the particular case, and largely depends on the view taken of the evidence.

The first and second points are so closely connected that I shall consider them together. The evidence does not establish that the second prosecution was in any way directed or sanctioned by the Finance Committee. Assuming that what took place in November amounted to a sanction of the first prosecution, the second prosecution was instituted by Mr. Collen on his own initiative, in the discharge of what ordinarily (though not strictly) would be considered part of his duty, and under pressure of the decision of the Exchequer Division, which practically left him no alternative. Mr. Woods was not present in November, and had no idea that the prosecution arose in any way out of any action of the Finance Committee. I do not see, therefore, that in any fair sense Mr. Collen can be said to have carried on the prosecution, as agent on behalf of the Finance Committee. Mr. Woods certainly had no knowledge of any such agency. Mr. Collen apparently mentioned the case in November, on account of the rank and position occupied by Mr. Ellis, and not because the sanction of the Finance Committee was legally requisite or was usual.

The same reasons convince me that there was no reasonable likelihood of bias; bare possibility is not enough: *Reg.* v. *Rand* (2); *Reg.* v. *M'Kenzie* (3). In the view that I take of the facts, *Leeson's Case* (1) seems an authority adverse to the idea that the conviction can be invalidated on any ground of bias. *Pettitmangin's Case* (4) is a still stronger authority. The objections to the conviction there were—first, that Mr. Rathbone, one of the Justices, was a member of the Watch Committee of the Town Council, and that the information was laid by a police inspector

(1) 43 Ch. Div. 366.
(2) L. R. 1 Q. B. 230.
(3) [1892] 2 Q. B. 519.
(4) Reported 9 L. T. (N. S.) 683, and also stated in counsel's argument in *Reg.* v. *Allan*, 4 B. & S. at p. 921.

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF CO. DUBLIN.

Gibson, J.

in pursuance of general directions given by that committee; secondly, that the fine would go, under section 336 of the Local Act, into the borough fund. The Liverpool Act, under which the conviction had taken place (5 & 6 Vict. c. 106), gave Justices (section 295) a power to award costs, and also (section 316) removed any disqualification arising from Justices' liability to payment of money towards the rates. This was the only disqualification dealt with in the Act. Both objections were overruled by the Court (Cockburn, C.J., Crompton, Blackburn, and Mellor, JJ.), the same Judges who decided *Reg.* v. *Allan* (1). It must be taken that the latter case was not supposed to be inconsistent with or to overrule the earlier decision. With regard to *Reg.* v. *Allan* (1), so much pressed by Mr. Ronan, from the nature of the Fishery Association, a body constituted for the protection of proprietary interests, the fact that R. H. Allan, one of the convicting Justices, was an ordinary member of the prosecuting association, was alone, in my judgment, sufficient ground for quashing the conviction. I say nothing as to J. W. Pease, the third Justice, whose position, as an honorary member only by virtue of subscription, may have been different, and may fall within the principle of *Leeson's Case* (2) and the *Deal Case* (3). *Reg.* v. *Allan* (1) differs from the present case in three fundamental particulars. The Association was directly for the protection of individual interests; it prosecuted by its officer, and the magistrates knew the fact.

The third objection is pecuniary interest, which, to vitiate a conviction, must not be too remote. In a sense, every Justice or Judge may be said in many cases to have some remote general interest as a member of the community or as a tax- and ratepayer. The case chiefly relied upon by Mr. Ellis's counsel on this point was *Reg.* v. *Gaisford* (4), which, however, assuming it to be well-decided, bears no likeness to the facts before us for decision. The conviction there directed a sale, the proceeds of which were ordered to be applied to the repair of the highway, thus reducing the rates to an infinitesimal extent in the convicting Justice's favour. The argument addressed to us was founded, not on any direct interest of Mr. Woods, but on the notion that if the prose-

(1) 4 B. & S. 915.
(2) 43 Ch. Div. 366.
(3) 45 L. T. (N. S.) 439.
(4) [1892] 1 Q. B. 381.

cution failed Mr. Collen would expect to be indemnified against costs, and that the Finance Committee might find means to get rid of this possible claim by deciding against Mr. Ellis. No semblance of authority was adduced in support of this position. No doubt cases might be put where the incidence of costs would disqualify from interest or bias, though no case was cited where a conviction was actually upset on such a ground. But, pressed to its logical extent, the argument here would go to show that no ratepayer could ever sit as Justice on a prosecution instituted by a County Surveyor. It occurs to me that the suggested interest is too remote, and could affect no reasonable or healthy mind. The County Surveyor had no legal right to be indemnified against costs. The functions of the Finance Committee, and their relations to the Surveyor, seemed to be somewhat misapprehended in argument. They are a statutory body, and have no powers save what the statute confers. The provisions of sect. 8 of 7 & 8 Vict. c. 106 apply to the Grand Jury and Finance Committee distributively, and must be interpreted with reference to their separate functions and powers respectively. The Grand Jury would have to decide as to the allowance of costs, if a prosecution were abortive, and their discretion could not be anticipated by the Finance Committee. No previous sanction of that body to a prosecution was necessary, and there was no evidence that in ordinary course any such sanction was asked for.

As to authorities: *Pettitmangin's Case* (1), already noticed, if well decided, is in favour of my view; and the *Deal Case* (2) has some bearing on the point. The prosecution there was under 12 & 13 Vict. c. 92, the 21st section of which directed that penalties were to be distributed as follows, viz. one-half to the overseers of the poor of the parish in which the offence was committed in aid of the rates; and the other moiety to the prosecutor, or to such other person as to the Court shall seem meet. The offence was committed in Deal, and adjudicated on by a Bench composed in part of Deal Justices, some of whom were subscribers to a Deal branch of the Society for the Prevention of Cruelty to Animals, an officer of which was the prosecutor. The sub-

(1) 9 L. T. (N. S.) 683. (2) 45 L. T. (N. S.) 439.

Q. B. Div. 1894.

THE QUEEN v. JUSTICES OF Co. DUBLIN.

Gibson, J.

scribers had no power of initiating or controlling the prosecution, and the case was, therefore, like *Leeson's Case* (1). No argument was addressed to the Court on the first branch of the 21st section, directing one moiety of the fine to go in aid of rates, and the argument turned on the second branch. "Although," said Cave, J., "the society's funds may be liable for the costs, or be benefited by a penalty, the subscribers would not be thereby affected." So here the failure of the prosecution would not by itself impose the costs on the county funds, unless the county authority chose, in their discretion, to pay them. It would be, I think, desirable for members of the Finance Committee, where possible, to abstain from sitting in cases of this kind. The administration of justice should not only be pure, but should seem to be so, and be free from any suspicion of interest or partiality.

It was an essential part of Mr. Ellis's case to show that, at the time of the conviction, he and his solicitor were ignorant of Mr. Woods's position : *Reg.* v. *Richmond Justices* (2) ; *Reg.* v. *Kent Justices* (3). In the affidavits on which the conditional order was granted, this necessary statement was omitted. The only attempt to supply it is in Mr. Ellis's affidavit in reply—if that is not too late—but that affidavit is entirely silent as to the solicitor's knowledge. I do not decide the case upon this ground, which was not put in argument, and which I only notice lest the Court should be supposed to disregard the English authorities on the subject, which I entirely approve of.

Solicitor for the relator : *F. A. Barlow.*
Solicitor for the Justices : *W. J. Shannon.*

G. G.

(1) 43 Ch. Div. 366.
(2) 8 Cox, C. C. 314 ; 8 W. R. 562 ; *sub. nom. Reg.* v. *Lord Huntingtower.*
(3) 44 J. P. 298.

M'CORMACK *v.* ROSS, BEATTY, AND NORMAN (1).

(1893. No. 2687.)

Q. B. Div. 1894. April 24, 25, 30.

Costs—"Set-off" of costs as between successful and unsuccessful defendants—R. S. C. (Ir.), Order LXV. (1893), *Rules* 16 *and* 64 (20)—*Solicitor's lien* (2).

In an action for assault and false imprisonment against three defendants A, B, and C, the plaintiff obtained verdict and judgment against A with costs, while verdict and judgment were entered for the defendant B against the plaintiff with costs.

On taxation, B, alleging that plaintiff had no means of otherwise satisfying his claim for costs, applied, under R. S. C., Order LXV., Rule 64 (20) to set off the costs payable by the plaintiff to the defendant B against the costs payable to the plaintiff by the defendant A. The plaintiff had previously assigned the amount of the judgment debt and costs due to him by the defendant A to his solicitor in consideration of the party and party costs due to him in the action. The Taxing Master having refused the application:—

Held, that the deduction or set-off should have been made. A solicitor's lien upon costs, or upon a fund recovered through him by a party in an action, is subject to the rights of the parties *inter se*, including the right of set-off or deduction of costs as between successful and unsuccessful defendants.

MOTION on behalf of the defendant Beatty for an order that it should be a direction to the Taxing Master in taxing the costs of

(1) Before HARRISON, JOHNSON, and HOLMES, JJ.

(2) *R. S. C., Order LXV.* (1893), *Rule* 16.—A set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought.

R. S. C., Order LXV. (1893), *Rule* 64 (20).—In any case in which, under the last preceding regulation, or any other rule of Court, or by the order or direction of a Court or Judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the Taxing Master may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such Taxing Master may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered.

Q. B. Div. 1894.

M'CORMACK v. Ross.

this action to set off the costs payable by the plaintiff to the defendant Beatty against the costs payable by the defendant Ross to the plaintiff, and that the ruling of the Taxing Master, dated 20th February, 1894, should be reviewed accordingly, or, in the alternative, that the Court should order that the said costs should be set off one against the other as aforesaid. The action was for arrest and false imprisonment, and was tried before the Lord Chief Baron and a special jury on the 11th and 12th December, 1893. The jury found for the plaintiff as against the defendant Thomas Ross, with damages assessed at £25; and, by direction of the Judge for the other defendants, Joseph Beatty, and Connolly Norman; and judgment was ordered to be entered for the plaintiff as against the defendant Ross for £25, and costs of suit.

On the 10th January, 1894, the plaintiff M'Cormack assigned to his solicitor, H. F. Leachman, all costs due and payable to him by the defendant Ross under the judgment in this action, in consideration of the amount due by him for party and party costs therein.

It was in controversy whether the plaintiff had any means whatever from which the defendant Beatty could realize the amount of his costs.

On taxation of the costs, before Taxing Master Mathews, on the 20th February, 1894, the defendant Beatty applied to the Taxing Master to set off the costs payable by him to the plaintiff against the costs payable by the defendant Ross to the plaintiff; but the Taxing Master refused to do so, certifying as follows:—"I rule that my power to direct a set-off is limited to the authority I derive from the General Orders in that behalf; but that if I have this authority to set off, having regard to the circumstances of this case, and to the assignment of 10th January, 1894, I should decline to exercise it and leave the question for the determination of the Court. I accordingly suspend the issue of the certificate of taxation for a week to enable Mr. Beatty to serve necessary notice of motion in the meantime."

Gordon, Q. C. (with him *W. M. Jellett*), for the defendant Beatty.

Seymour Bushe, Q. C., and *T. H. Maxwell*, for the plaintiff.

Reference was made during the argument to the following:— *Holroyd* v. *Breare* (1); *Norman* v. *Climenson* (2); *Lees* v. *Reffitt* (3); *Gambrell* v. *Falmouth* (4); *George* v. *Elston* (5); *Starling* v. *Cozens* (6); *Barker* v. *Hemming* (7); *Edwards* v. *Hope* (8); *Robarts* v. *Buèe* (9); *Pringle* v. *Gloag* (10); *Blakey* v. *Latham* (11); *Pelton* v. *Harrison* (12); *Mordecai* v. *Nutting* (13); R. S. C. (Ir.) Order LXV. (1893), Rules 16 and 64 (20); R. S. C. (Ir.), Order X. (1878), Rule 17; General Orders of 1854 (Ir.), Order CXVII.; the English Orders corresponding thereto in force from time to time; Gray on Costs (Ed. 1853), pp. 101, 102.

Cur. adv. vult.

April 30.

HARRISON, J.:—

In this case a motion has been made on behalf of the successful defendant, Beatty, for a direction to the Taxing Master to set off against the costs due by the unsuccessful defendant Ross to the plaintiff the costs due by the plaintiff to him, or in the alternative that the Court do order that said costs be so set off. When the action, which was one of false imprisonment, was tried, the jury found a verdict of £25 damages for the plaintiff M'Cormack against the defendant Ross, and judgment with costs has been entered accordingly; but, in regard to Dr. Beatty, one of the other defendants, the learned Chief Baron who tried the case directed a verdict for the defendant, with costs, and judgment has been so entered. When the matter came before the Taxing Master for the taxation of the costs, he was asked to set off the costs payable by the plaintiff to Dr. Beatty against the costs payable by the defendant Ross to the plaintiff. It appeared that by an assignment made on the 10th January, 1894, before the date of taxation, the plaintiff had assigned all the costs payable to him to his

(1) 4 B. & Ald. 43, 700.
(2) 4 M. & Gr. 243.
(3) 3 A. & E. 707.
(4) 5 A. & E. 403.
(5) 1 Bing. (N. C.) 513.
(6) 3 Dowl. 782.
(7) 5 Q. B. Div. 609.
(8) 14 Q. B. Div. 922.
(9) 8 Ch. Div. 198.
(10) 10 Ch. Div. 676.
(11) 41 Ch. Div. 518.
(12) [1892] 1 Q. B. 119.
(13) Barnes, 145.

Q. B. Div. 1894.

M'CORMACK v. ROSS.

Harrison, J.

solicitor in satisfaction of the latter's claims against him. The Taxing Master ruled, as appears by his memorandum, that his power to set off was limited to the authority that he derived from the General Order in that behalf; but that, if he had the authority to set off, having regard to the circumstances of this case, and to the assignment of the 10th January, 1894, he should decline to exercise it, and leave the question for the determination of the Court; and he accordingly gave the defendant Dr. Beatty an opportunity of applying to the Court, by suspending the issue of the certificate of taxation for a week.

The principle affecting this matter has been the subject of several decisions in England. In the case of *Holroyd* v. *Breare and Others* (1), which was a case of trespass, the Court of King's Bench refused to set off the costs of a successful defendant against the costs due to the plaintiff by an unsuccessful defendant; and Mr. Justice Bayley, at page 46, said:—"As to the liberty of setting off the costs against each other, that cannot be allowed, because it would destroy the lien of the plaintiff's attorney"; and Mr. Justice Best added that if they were to grant it they should disturb the lien to which the plaintiff's attorney was entitled. The question came next before the Court of Common Pleas in England in the case of *George* v. *Elston and Others* (2) in 1835, the General Rule of Hil. 2 W. 4, 93, being in force. Tindal, C. J., says in his judgment that the rule "applies to cases where there is a cross-claim for costs in separate actions. In this cause the two defendants who make the application are brought into Court by the plaintiff; and, the verdict being in their favour, there is no reason why they should not have their costs"; and the deduction was allowed, notwithstanding the attorney's lien, following an old case of *Schoole* v. *Noble and Others* (3), which decided that an attorney's lien was subject to the equitable claims of the parties in the cause. The next case in which the question arose in England was in the Queen's Bench: *Lees* v. *Reffitt* (4), in 1835, a case of assault and battery, where the Court considered that the authority of *George* v. *Elston* (2) was one which they could not get over, and that the costs of the successful defendants must be set-off against the costs pay-

(1) 4 B. & Ald. 43, 700.
(2) 1 Bing. (N. C.) 513.
(3) 1 H. Bl. 23.
(4) 3 A. & E. 707.

able by the unsuccessful defendants; and, in 1842, in *Norman* v. *Climenson and Others* (1), such a set-off was allowed, and in the absence of special circumstances.

By the 117th General Order in this country of the General Orders of 1854 it was provided that no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the claim of set-off is made.

By Order LXV., however, Rule 16 of the Supreme Court (Ireland) Rules of 1893, it is provided that a set-off may be allowed between parties, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought; and by Rule 64, sub-s. 20, a discretion is given to the Taxing Master. In any case in which under the last preceding regulation, or any other rule of Court, or by the order or direction of a Court or Judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the Taxing Master may tax the costs and adjust the same by way of set-off, or he may delay the allowance of the costs, or he may allow and certify the costs to be paid. One of the affidavits here shows that unless Dr. Beatty is allowed to set off his costs he will never be able to realize them. Mr. Leachman says that this will interfere with his lien; and he contends that having got an assignment of these costs his rights should not be interfered with. I am of opinion, however, that the right of the defendant Dr. Beatty to set off his costs as against the costs due by the defendant Ross is paramount to Mr. Leachman's lien or his rights under the assignment of the 10th January, 1894, and that such set-off should be granted and the case remitted to the Taxing Master to have same allowed.

JOHNSON, J.:—

M'Cormack the plaintiff sued Ross, Dr. Beatty, and Dr. Norman for assault and false imprisonment. Ross and Beatty appeared, and defended by the same solicitor, and filed a joint defence. Dr. Norman appeared and defended separately. The plaintiff had verdict and judgment against Ross for £40 damages and

(1) 4 M. & Gr. 243.

Q. B. Div. 1894.

M'Cormack v. Ross.

Johnson, J.

costs, and the plaintiff's solicitor has obtained a charging order on these damages for his costs under the 39 & 40 Vict. c. 44, sect. 3; but the plaintiff failed against Drs. Beatty and Norman, each of whom had verdict and judgment for costs against the plaintiff, who, it appears by affidavit, is not of means to pay these costs. It is stated that Dr. Norman's costs will, in any event, be otherwise provided for; but, as Dr. Beatty has no other resource, he, with the consent of Ross, applied on the taxation to the Taxing Master to deduct the costs payable to him by the plaintiff from the costs payable to the plaintiff by Ross. The Taxing Master declined to comply with this application, and made the ruling which my brother Harrison has read; but the Taxing Master suspended the certificate, to enable Dr. Beatty to apply to this Court; and he now, with the consent of Ross, moves for a direction to the Taxing Master to deduct, from the costs payable by Ross to the plaintiff the costs payable by the plaintiff to Dr. Beatty, so that, by thus intercepting an equivalent amount of the costs payable by Ross (who is solvent) to the plaintiff, Dr. Beatty may be paid the costs payable to him by the plaintiff, who otherwise is without means to discharge Dr. Beatty's costs.

This application is resisted in the name of the plaintiff, but practically by his solicitor, on the ground that the costs payable by Ross to the plaintiff are subject to a lien for the costs due by the plaintiff to his own solicitor, which would be prejudiced if this application was successful. The plaintiff by deed, referred to in the ruling of the Taxing Master, assigned his costs to his solicitor, who, it is stated at the bar, received no money whatever from the plaintiff, and advanced out of his own money all the funds, and did all the work necessary for the action. It is contended for Dr. Beatty that this deed only passed what the plaintiff could assign, and therefore does not much, if at all, affect the question raised by the present motion, which concerns the rights of the parties in the same action to the costs in that action, paramount to any lien of plaintiff's solicitor. The common law gives a solicitor a lien for his costs on money in his hands recovered by him for his client. "If the money comes to his hands he may retain the amount of his bill, he may stop it *in transitu*, if he can lay hold of it" (*per* Lord Mansfield: *Welsh* v.

Hole (1); and he has also a general lien for his costs on his clients' documents and papers (subject to some well-established exceptions). The solicitor may also by statute obtain from the Court, as was done in the present case, an order, charging property recovered or preserved by him in the suit or proceeding for his costs in reference to such suit or proceeding, under 39 & 40 Vict. c. 44, s. 3; but his claim in reference to such costs as those now under consideration, though usually called a lien on the costs, is, in my opinion, limited to the balance of the costs accruing to his client in the particular action, subject to the rights of the parties in the same action to deduct or set off costs in that action, and which balance is ultimately determined on the final result of the action. This right of deduction, or set-off, had its origin in the general jurisdiction of the Courts over their proceedings and suitors, and although at first the practice in England in the different courts was not uniform, it became settled long since. It has accordingly been held from early times that a party to a cause is entitled to have his costs deducted or set off against whatever costs may be due to the opposite party in the particular cause, without regard to the costs of the solicitor of the opposite party, and even where there are several defendants, and the plaintiff succeeds against one or more of them, but fails against one or more, the successful defendant or defendants have, by this deduction and set-off, been held entitled to be paid out of the costs awarded to the plaintiff against the unsuccessful defendant or defendants. Deducting or setting off costs in the particular action between the parties to that action stands on wholly different grounds from deduction or setting off costs of different judgments or proceedings, which depends on considerations not involved in the present motion.

We were referred during the argument to *Mordecai* v. *Nutting* (2), where such deduction as is now sought was refused by the Common Pleas as unprecedented; but this decision is inconsistent with the decision of the same Court in *Roberts* v. *Biggs* (3), and in *Schoole* v. *Noble, Lett, & Byrne* (4), which was an action of trespass. Lett and Byrne suffered judgment by default. Noble went to trial and got a verdict. It appeared by affidavit

(1) 1 Doug. 238.
(2) (1750) Barnes, 145.
(3) (1757) Barnes, 146.
(4) (1788) 1 H. Bl. 23.

Q. B. Div. 1894.

M'Cormack v. Ross.

Johnson, J.

that Lett and Byrne had acted under the authority of Noble, who undertook to pay the damages and costs, and the Court of Common Pleas held that the attorney could only have such lien on the costs as was subject to the equitable claims of the parties in the cause, and ordered the costs payable by the plaintiffs to Noble to be deducted from the costs payable by Lett and Byrne to the plaintiff. In *Holroyd* v. *Breare & Holmes* (1), which also was an action of trespass, both defendants appeared by the same attorney and pleaded the general issue with separate justifications. The defendant Breare had a verdict generally. The defendant Holmes proved his justification, but failed on the general issue. The Court of King's Bench refused, on the application of Breare, to allow the costs payable by the plaintiff to him to be set off against the costs payable by Holmes to the plaintiff, "as it would obstruct the lien of the plaintiff's attorney," and distinguished *Schoole* v. *Noble* (2) on the ground that the plaintiff applied in that case, and that Lett and Byrne had acted on the authority of Noble, who undertook to pay the costs and damages. This distinction in principle between the cases seem very thin, if there is any, and the K. B. afterwards disregarded this decision. In 1832 was passed Rule 93, H. T. 2 Wm. 4 (Eng.), to which we were referred (and the history and object of which will be found, 10 C. B. 427), followed in the same terms afterwards by Rule 63, H. T., 1853 (Eng.), from which was taken the 117th G. O., 1854 (Ir.), providing that "no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the claim of set-off is made, provided nevertheless that interlocutory costs in the same suit awarded to the adverse party may in all cases be set off." In January, 1835, in *George* v. *Elston, Eveleigh, & Cork* (3), which was an action of trespass, the plaintiff had a verdict for damages and costs against Cork, but failed against Elston and Eveleigh. The Common Pleas held that R. 93, H. T. 2 Wm. 4, applied only to cross claims in separate actions, and, following their previous decision of *Schoole* v. *Noble* (2), ordered the costs of Elston and Eveleigh to be deducted out of the costs payable to the plaintiff by Cork without regard to

(1) (1820) 4 B. & Ald. 43, 700. (2) (1788) 1 H. Bl. 23.
(3) 1 Bing. (N. C.) 513.

the lien of the plaintiff's attorney. In the same year (1835) the question again came up before the King's Bench for decision in *Lees* v. *Reffitt*, *Kendal*, *Radcliffe*, & *Stenson* (1), which was trespass for assault and battery. The defendants defended separately, and with separate counsel and solicitors. The plaintiff recovered damages and costs against Kendal, but failed as to the others. The King's Bench, on the application of the other three defendants, set off the costs payable by the plaintiff to them against the damages and costs payable by Kendal to the plaintiff, following *George* v. *Elston* (2) in the Common Pleas, and holding it decisive of the case then before the Court, notwithstanding they were pressed with the decision of their own Court in *Holroyd* v. *Breare* (3). In the same year, 1835, *George* v. *Elston* (2) was followed in the Exchequer (Eng.), in *Starling* v. *Cozens* (4) on the defendant's application. The case in the King's Bench of *Gambrell* v. *Falmouth* (5), which was cited, does not touch the present question, because Serjeant Talfourd, during the argument, stated that it was not desired by the defendants (his clients) to interfere with the attorney's lien, and therefore Lord Denman said, p. 411:—"No point remains as to the set-off, it being agreed that that must be subject to the attorney's lien." But in *Norman* v. *Climenson*, *Browne*, & *Tiffin* (6), in 1842, the principle was again decided in an action of trespass where the plaintiff recovered against Climenson and Browne and failed against Tiffin, who was held entitled to the deduction of the costs payable by the plaintiff to him out of the costs payable by Climenson and Browne to the plaintiff.

In *Scott* v. *Comte de Richebourg* (7), in 1851, the Common Pleas again followed *George* v. *Elston* (2); and *Lees* v. *Reffitt* (1). The practice, therefore, became uniform in England, and appears to be so assumed in the Practice text-books, Archbold and Lush. The reports in Ireland are very barren of authority on the subject, though same cases may be found referred to in Brunker's Digest. There is no rule in the orders under the Judicature Acts, either in England or Ireland, similar to Rule 63, H. T. 1853 (Eng.),

(1) 3 A. & E. 707.
(2) 1 Bing. (N. C.) 513.
(3) (1820) 4 B. & Ald. 43.
(4) 2 C. M. & R. 445; 3 Dowl. 782.
(5) (1836) 5 A. & E. 782.
(6) 4 M. & Gr. 243.
(7) 11 C. B. 447.

Q. B. Div. 1894.

M'Cormack v. Ross.

Johnson, J.

or Gen. Ord. 1854, CXVII. (Ir.); but in each country, after the Judicature Acts, the Order in reference to costs (Costs—April, 1878 (Ir.), Ord. X., R. 17 (Ir.); Ord. VI. (Costs), R. 19 (Eng.)), contained a rule similar to the present Costs Order LXV., R. 20 (1893), Ireland, which has been so much discussed on the present argument, and it was decided (1880) under that Order that costs were to be set off, not as between persons but as between parties in the same action in their character of parties to it, and that the rule applied and was limited to cases where a party entitled to receive was also liable to pay costs, in respect of matters arising in the same action between the same parties in their character of parties to that action, and not to the costs of separate proceedings: *Barker* v. *Hemming* (1). A change was subsequently made by Ord. LXV., R. 14 (1883, Eng.); Ord. LXV., R. 16 (1893, Ir.), providing in terms the very converse of Rule 63, H. T. 1853 (Eng.), and Gen. Ord. (1854) CXVII. (Ir.), that "a set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought."

This rule applies to damages or costs in the particular action, and between the parties to that action in their character as parties in that action, but not to damages or costs in independent or in separate proceedings: *Edwards* v. *Hope* (2). And Kay, J., in 1889, taking the same view, held that the right to set off costs existed in the same action, but that in independent proceedings it was intercepted by the solicitor's lien: *Blakey* v. *Latham* (3). This accords with and carries out the former practice, under which right of deduction or set-off existed as to damages and costs in the particular action, between the parties to that action, without regard to solicitor's lien; but, in setting off judgments against each other, as the Courts exercised a discretion to secure the solicitor his costs, so they continue to do: *Edwards* v. *Hope* (2).

The remaining question is the construction of Rule 20, Ord. LXV. (Costs), 1893. Under the old practice the Court had jurisdiction to order the deduction or set-off; yet the Taxing Master might have made it without the order of the Court—see

(1) 5 Q. B. Div. 609. (2) (1885) 14 Q. B. Div. 922. (3) 41 Ch. Div. 518.

Maule, J., in *Scott* v. *Comte de Richebourg* (1)—and that he can do so under the present system appears from *Re Crawshay* (2). But I do not think Rule 20, or any other provisions in the Gen. Orders of the Supreme Court, invests the Taxing Master with a judicial discretion to allow or disallow deduction or set-off. Where that right exists it exists as a matter of principle. But R. 20 empowers the Taxing Master, in carrying out his duty of taxation, either to adjust the costs by deduction or set-off (where the right exists), and certify the balance; or, if he thinks fit, to delay the allowance of the costs to the person to receive them until that person has paid the costs he is liable to pay; or he may certify the costs in the ordinary way, and leave each party to recover the certified amount.

In my opinion Dr. Beatty is entitled, in the circumstances of the case, to have his costs deducted from or set off against the costs payable by Ross to the plaintiff. It seems almost a matter of course. In no other way can he obtain payment.

Then it is said this is hard on the solicitor, who has advanced all his own money, and given all his work, without receiving anything from his client; but, on the other hand, as Jessel, M. R., says: "If a solicitor says, 'Unless I have a lien I cannot get paid,' the answer is he should see before he undertakes a particular business for a client that the client is able to pay him for it."

Whether Dr. Beatty is entitled to this deduction or set-off, as I think he is, or whether it is discretionary with the Court to allow it, in either event he ought, in my opinion, to have it. It would be a singular result if, by the action of the Court and the Taxing Officer, or either of them, Ross is obliged to pay all his costs to the plaintiff, who hands over the money to his solicitor, and Dr. Beatty is told to recover his costs as best he may from the plaintiff, who has no means to pay them, in effect giving to the plaintiff's solicitor a lien, not on the balance of costs coming to the plaintiff on the result of the whole action, but also on the costs which Dr. Beatty ought to receive from the plaintiff.

I therefore think that the motion ought to be granted, with costs.

(1) 11 C. B. at p. 449. (2) 45 Ch. Div. 318.

Q. B. Div. 1894.

M'Cormack v. Ross.

Holmes, J.:—

In the year 1820, an application similar to the present was refused in the English Court of King's Bench, upon the ground that it ought not to be granted to the prejudice of the lien of the plaintiff's solicitor. In at least three subsequent cases of equal authority, it was held that an application of this kind ought to be granted, notwithstanding the lien of the plaintiff's solicitor. The last-mentioned cases have not, as far as I am aware, been subsequently questioned. They have been quoted as binding authorities in books of practice; and I have no doubt that they have been often acted on. They were decided after a rule had been made in England corresponding to the 117th of the Irish General Orders of 1854. The English Courts in the cases to which I have referred, seem to have been of opinion that this rule did not apply to an application of this kind, and that such an application was to be dealt with under what may be described as the common law of the Court. If they were right in this, nothing has happened since to alter the common law in this respect; if they were wrong, the English Rule and the Irish General Order are now repealed; and a provision has taken their place, which declares that a set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought. If this rule applies, it removes all difficulty. If it does not, we adhere to the law as declared by Chief Justice Tindal, and followed by many other judges.

Solicitor for defendant Beatty: *Gerald Byrne.*
Solicitor for plaintiff: *H. F. Leachman.*

A. E. R. J.

PRATT, TENANT; VISCOUNT GORMANSTOWN, LANDLORD (1).

Appeal. 1894.

April 17, 18, 23.

Demesne land—Tenancy from year to year—Land used as demesne—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49).

A holding consisted of 35 acres, which had been held by the tenant and his predecessors in title, under a yearly tenancy from the landlord and his predecessors in title, for a great number of years. The tenant and his predecessors owned freehold lands to the extent of about 1000 acres, including a mansion-house and demesne, which were adjacent to the holding in question. The holding had been used for non-agricultural purposes, planted, grazed, and treated as ornamental or accommodation land in connexion with the mansion-house:—

Held (by Walker, C., and Barry, L.J.), that the land was neither agricultural nor pastoral *in its character*, and that a fair rent could not be fixed.

Held (by Sir P. O'Brien, C.J., and FitzGibbon, L.J.), that the land was demesne land, and also was not agricultural and pastoral *in its character*.

Magner v. *Hawkes* (32 L. R. Ir. 285) commented on.

APPEAL from the Land Commission.

The facts of the case are reported, [1894] 2 Ir. R. 279.

Kenny, Q.C., and *Wakely*, for the tenant.

Meredith, Q.C., and *Hackett*, for the landlord.

Cur. adv. vult.

WALKER, C.:—

April 23.

In this case the originating notice has been dismissed, on the ground that the lands in question were demesne lands, and Mr. Justice Bewley considered that in so deciding he was following and bound to follow the case of *Magner* v. *Hawkes* (2) in this Court. It is quite true that there are observations in the judgmeut of some of the learned Judges in that case which go far to justify

(1) Before WALKER, C., SIR PETER O'BRIEN, C.J., and FITZ GIBBON and BARRY, L.JJ.

(2) 32 L. R. Ir. 285.

Appeal. 1894. PRATT, *Tenant;* GORMANSTOWN, *Landlord.* Walker, C.

that view of Mr. Justice Bewley, but in the case of *Magner* v. *Hawkes* (1), the contest was between a landlord, asserting that the lands were demesne lands of his and a tenant, who insisted that they were not. In the present case the lands could never under any circumstances be the demesne lands of Lord Gormanstown, and if they were surrendered or evicted they would, *ipso facto*, lose any such imputed character. I think the question is a most important one, whether land can be "demesne land" within the meaning of the excepting clause of the Act of 1881, unless when there is a landlord, who claims them as his demesne and asserts his right to resume them as such, without the incident of a fair rent being fixed on them. I cannot find any case which has gone so far; as I think this case can be decided without laying down any direct principle, I express no opinion upon it.

What, however, we do find is that the present holding has been, by an ancestor of the tenant at a date lost in antiquity, made part of the Cabra demesne. The demesne embraces holdings of different tenures, a large part held in fee, and some for lesser terms, and the present held from year to year. The Cabra demesne is a mansion-house with attached lands, all ornamentally planted, constituting coverts for game, and as a whole subject, I think it would be impossible to treat it as an agricultural or pastoral holding. By the acts of the tenant's predecessors in title the holding was thrown into and incorporated with this subject. It was taken for that purpose and treated for it. It is an island of grass of nineteen acres surrounded by fourteen acres of planting, and as I think the tenant has incorporated it with the whole, I do not think he can now separate it and say it is an agricultural or pastoral holding to be separately treated from that to which he has indissolubly united it by his acts. The case of *Allen* v. *Grogan* (2) has a strong bearing on the present case, and would have been sufficient in the Court below for the determination of this case.

We are, of course, not bound by the decision, but its principles are, I think, applicable to the present, and I am of opinion that the order appealed from should be affirmed, on the grounds that

(1) 32 L. R. Ir. 285. (2) 32 L. R. Ir. 179.

on all the facts proved the holding is not agricultural or pastoral in its character.

SIR PETER O'BRIEN, C.J.:—

I concur in thinking that the judgment of the Land Commission should be affirmed. I do so on the ground that these lands were demesne lands, and come within the exception of the Act of Parliament. There can be no doubt that these lands were incorporated with the demesne of Mr. Pratt; they were made part and parcel of his demesne, and form an integral part of it. But are they demesne land within the meaning of the exception of the Act of Parliament? The words of the Act of Parliament are "any demesne land." Beyond all question, they form part and parcel of the demesne; and the words of the Act of Parliament are "any demesne land." I can find nothing to limit the generality of these words, either in the language of the Act of Parliament or in the policy of the Legislature.

As to the circumstances under which the contract was made —Mr. Pratt, or his predecessors in title, take these lands. They comprise some 35 statute acres, and of that about 14 acres were planted. He, or rather his predecessors, make these large plantations, and bring them into line with the coverts on the demesne. Whether they do so for the amenity of the estate, or for shooting, or hunting, does not appear, but they bring them into line with the coverts in the demesne. In my judgment, it was not the policy of the Legislature that persons who get land and use it in this way are to be relieved against a contract which they deliberately entered into: the words of the Act, which are my guide, do not warrant it.

It has been said that demesne lands may be demesne lands subjectively; that they may be demesne *quoad* A and *quoad* B, but not *quoad* C. For my own part, I am of opinion that, once it was decided, as it was decided in *Magner* v. *Hawkes* (1), that no particular kind of tenure is essential to constitute demesne land, the question is—What, having regard to all the circumstances, is the concrete thing? Is it demesne land? And once it is, it is a demesne against all the world, and not only against A and B.

(1) 32 L. R. Ir. 285.

Appeal. 1894.

PRATT, *Tenant;* GORMANSTOWN, *Landlord.*

Sir P. O'Brien, C.J.

If a place is a flower garden *quoad* A and B, it is a flower garden *quoad* all the world. This, amongst other points, and notably that with reference to tenure, was what was decided by the Lord Chief Baron and by myself in *Magner* v. *Hawkes* (1). It is said that this part of the Chief Baron's judgment was extra-judicial. So far as his judgment was concerned, it was clearly not; it was the *ratio decidendi,* the very ground of his decision. Here is what he says:—"The main ground relied upon in support of this narrower construction is that a lease, such as that of 1752, for 990 years, negatives any intention by the lessor to resume occupation; and it is said that there are some expressions in the judgments in *Griffin* v. *Taylor* (2), which indicate that if the representatives of the lessor evicted the lessee and resumed possession, the lands could not be demesne as against them, and that therefore they cannot be demesne against anyone. I entirely concur in so much of this reasoning as insists that lands cannot be 'demesne' within the meaning of the Act, subjectively, and that if the holding is not 'demesne' *quoad* everyone, it cannot be demesne at all; but I contest the prior step in the argument. The right to have a fair rent fixed is a right given to the tenant in occupation of such lands, as, at the passing of the Act, answered a particular description; and although whether they answered that description must usually depend upon the acts of particular persons the lands are, according to the nature of those acts, either brought within or excluded from the Act, not *quoad* those particular persons, but as to *all* persons having estates therein. Of two tenants for short terms of years, holding under the one landlord, one may have sublet parcel of his holding 'wholly or mainly for the purpose of pasture,' whilst the other may have let part of his holding without any such limited purpose. The head landlord may not have done any act whatever in relation to either holding, still, one sub-tenant may, and the other may not, have acquired rights under the Act against that head landlord.

"So, too, of two tenants of a common head landlord, one may, and the other may not, have constituted his holding demesne, and then each may have sublet; in my view in such a case the sub-

(1) 32 L. R. Ir. 304. (2) 16 L. R. Ir. 197.

tenant of one might have no right, and the sub-tenant of the other might have a right under the Act against the common head landlord. I hold, then, that in determining whether lands are demesne, we must work up from the occupier, and consider the question as between him and his immediate landlord. If their relations are such that the lands are 'demesne,' within the meaning of the Act, they are so, not as between them solely (as had been argued), but for all purposes, and so as to bind everyone."

Nothing could be clearer than this language. It plainly demonstrates that so far as the Lord Chief Baron's judgment was concerned it was not extra-judicial; it was the very groundwork of his judgment. The proposition he affirmed was "Demesne lands against all or none." I well remember that Mr. Healy argued the point at great length. No doubt the question of tenure formed a main or principal feature of the discussion, but Mr. Healy asked and persistently pressed the question, Were the lands demesne lands in relation to Tonson, the head landlord? I gave my answer to the question, and the Lord Chief Baron dealt with it with a minute elaboration. But suppose Mr. Pratt sublet these lands, would they be demesne lands in the hands of the sub-tenant? I do not know whether that was denied or not. In my opinion, on the authority of *Magner* v. *Hawkes* (1), they would be, once they were incorporated by Mr. Pratt in his demesne, and not undemesned by him.

I am of opinion that the judgment of Bewley, J., is right. I do not dissent from the ground of the decision of the Lord Chancellor founded on *Allen* v. *Grogan* (2). If I might venture to criticise the language of the judgment in that case, I would say that the motive of the take as distinguished from the character and user of the thing taken was made too much the basis of the decision. I do not dissent from the view taken by the Lord Chancellor, but for the reasons I have assigned I think the judgment of Mr. Justice Bewley is right.

FITZ GIBBON, L.J.:—

Mr. Justice Bewley goes too far when he says that, "having regard to the recent decisions of the Court of Appeal," it

(1) 32 L. R. Ir. 285. (2) 32 L. R. Ir. 179.

Appeal. 1894. PRATT, *Tenant;* GORMANSTOWN, *Landlord.* Fitz Gibbon, L.J.

is "perfectly immaterial whether the interest in this holding is an interest in fee-farm, under a lease for a term of years, or under a tenancy from year to year." *Magner* v. *Hawkes* (1) certainly did decide that a person who takes agricultural land for a term of years, can turn it into "demesne land" within the meaning of the Land Acts, and can sublet it to an occupying agricultural tenant, who will be excluded from the benefit of those Acts, because the holding is still "demesne land," But this Court never decided, and I do not believe that any member of it ever thought, that the character of the tenant's interest was immaterial to the question whether the holding was or was not "demesne land." The tenure is always a material element, but, since *Magner* v. *Hawkes* (1), it is not conclusive.

However, in my opinion, the decision of the Court in *Magner* v. *Hawkes* (1) rules this case, not by the opinion of any one Judge, but by the essential and cardinal principle of the decision itself, which got rid of the idea of resumption by the owner in fee, as essential to "demesne land." If a termor can (as *Magner* v. *Hawkes* (1) decides he can) convert a chattel holding into "demesne land," he must be capable of doing so while it is still in his own occupation. A subsequent subletting may "undemesne" the holding, or may tend to show that it is not "demesne land"; but I fail to see how the termor can keep it out of the Land Acts, and fix a fair rent for himself, when, if let to a sub-tenant, it would be "demesne land," and would be excluded as such from the Land Acts.

The facts of this case are perfectly plain. The holding has been, so far back as evidence can go, planted, grazed, and treated as ornamental or accommodation land connected with the mansion-house of a gentleman of large property. It has been incorporated with Mr. Joseph Pratt's demesne, exactly as the "demesne land" in *Listowel* v. *Hewson* (2) was incorporated with "the entire farm" of Ennismore. It has, so far back as evidence can go, always been part of the "demesne land" occupied with Mr. Pratt's mansion-house; if necessary, I should hold that it was originally taken for that purpose. If all or any part of this holding had been let to a sub-tenant, that sub-tenant would be excluded from

(1) 32 L. R. Ir. 285. (2) *Ibid.* 700.

the Land Acts upon the essential principle of the decision in *Magner* v. *Hawkes* (1). I therefore cannot hold that the land is not "demesne land" in Mr. Pratt's hands, when it would have been "demesne land" in the hands of his sub-tenant, if he had sublet it. Basing my judgment on this ground, I keep clear of any question as to whether "demesne land" must bear that character "subjectively," or "up and down," or not at all, and I keep equally clear of considerations of the supposed "policy of the Legislature" as a guide to the construction of the statute.

While I think it only just to the Land Commission, and even necessary for its guidance, to state my opinion that the principle of *Magner* v. *Hawkes* (1) rules this case, I may add that I think *Allen* v. *Grogan* (2) also lays down a principle upon which the decision in favour of the landlord can be sustained. The Land Acts do not apply to "any holding which is not agricultural or pastoral in its character, or partly agricultural and partly pastoral," and they do not apply to several classes of holdings, including "any demesne land." If a person takes land which is at the time agricultural land, he can, in my clear opinion, deprive it of that character. Whether he has done so or not must be determined in each case upon the evidence, but, if he does so, he can no longer claim the benefit of the Acts passed for agricultural or pastoral tenants—in other words, for *farmers*. Any other decision would lead to the most absurd consequences, having regard to the statutory conditions which attach to all fixed tenancies. A holding agricultural at the creation of the tenancy—for example, a holding taken under a long lease for years as a farm—is often, in the course of time, turned by the tenant to other uses. How many "demesnes," "residential holdings," mills or other buildings, how many holdings, now utterly unagricultural, were originally farms, which have wholly lost their agricultural character? After a holding has been so changed, the tenant cannot, in my opinion, serve an originating notice, and fix a fair rent, as an agricultural tenant.

A fortiori, the tenant who has himself taken agricultural land for the purpose of converting it to non-agricultural uses, for example, of changing it into "demesne land," or of building upon it, or of putting it to any other use outside the scope of the Land Acts, and

(1) 32 L. R. Ir. 285. (2) *Ibid.* 179.

Appeal. 1894. PRATT, *Tenant;* GORMANSTOWN, *Landlord.*

who has changed the character of the holding accordingly, must be held to have thereby taken himself and his holding out of those Acts. Mr. Pratt, having clearly done this, must fail in his appeal on that ground also; but in this particular case the only non-agricultural or non-pastoral character which the holding is proved to have seems to me to be that of "demesne land," and as such it is excluded.

BARRY, L.J.:—

This case comes before us on the application of the tenant, Mr. Joseph Pratt, to have a fair rent fixed for a holding in the county of Meath, held by him, as tenant from year to year, under Lord Gormanstown. The facts material to the question before us are few and simple. Mr. Pratt is the owner of large landed property, including a fine family mansion, and a spacious demesne, in Meath and Cavan. In course of time his predecessors in title acquired from the predecessors in title of Lord Gormanstown a tenancy from year to year in the holding which is the subject of the present application. The purpose for which the Pratt family took the holding (containing about 35 acres), was manifestly, from their acts, to add it to their demesne, and accordingly they did, as the phrase is, throw it into the demesne, and thenceforth treated it as practically part thereof. There was an effort to contend before us, that it was not so treated, but the evidence against that contention was, in our opinion, overwhelming. In this state of things, Mr. Pratt applied to the Land Commission to have a fair rent of this small portion of his demesne fixed as against Lord Gormanstown, of whom, or of any of whose predecessors, the holding is not, and never was, "demesne lands." In whatever sense the word "demesne" is used, feudal or popular, the land comprised in the holding cannot, and never could be, described as the "demesne" of Lord Gormanstown, or any of his predecessors.

The Land Commission Court (reversing the decision of the Sub-Commissioners), held that the holding was "demesne land" within the exception contained in the 58th section of the Land Act of 1881, on the ground, as expressed, or at all events implied, in his judgment by Mr. Justice Bewley, that such was the *decision*

of this Court in *Magner* v. *Hawkes* (1), not that such a consequence might be held to flow from that decision, but that it was *the actual decision* of this Court. In my opinion, whether the decision of this case by the Land Commission Court be right or wrong, if, as certainly seems to be the case, such be the ground of the judgment, it is based upon a misinterpretation of *the decision* of this Court in *Magner* v. *Hawkes* (1).

What were the facts of that case, and what was the question raised in it? In 1752 Richard Tonson let to William Owgan the holding for 990 years, at a rent of £126. This lease became vested in a Captain Hawkes, who, or whose successors in title, built on the holding a mansion-house, and laid out the surrounding land as "a demesne." The Hawkes family, for many generations, held the premises, which this Court decided had acquired all the physical characteristics and attributes of a mansion and demesne. In 1868 the then owner, Captain Samuel Hawkes, died, and the premises became vested in his widow. In 1872 she, as executrix, made a lease to her brother-in-law, John Devonshire Hawkes, for thirty-five years, and the lessee's interest in that lease subsequently became vested in Magner. In September, 1887, Magner applied to the Land Commission to have a fair rent fixed, and this originating notice was dismissed by the Sub-Commission, and by the Land Commission, on the ground that the holding was "demesne" land, and Magner appealed to this Court, contending, first, that the lands had not the physical characteristics of a demesne; second, that inasmuch as *the Hawkes family were not owners in fee*, the holding could not be demesne land within the meaning of the Land Act; and, third, that even if it were "demesne land" it had been undemesned by the lease of 1872. The first and third points are immaterial for the matter before us, and I shall therefore deal with the second point as "the question" in *Magner* v. *Hawkes* (1).

The question thus raised for the decision of this Court is described by the Lord Chief Justice in the report of the case in 32 L. R. Ir. 296. The Lord Chief Justice there says:—

"The great importance of the case arises from the fact that it

(1) 32 L. R. Ir. 285.

Appeal. 1894. PRATT, *Tenant*; GORMANSTOWN, *Landlord.* Barry, L.J.

was strenuously, most strenuously, contended at the bar that it was an essential part of the definition of demesne lands, within the meaning of the Land Law (Ireland) Acts, that they should be held in fee, that once it appeared that the lands in question were held by the person on whom the *onus* lay to prove them to be demesne lands, by lease for years, no matter how long the lease might be, they could not be held to be demesne lands within the meaning of the Land Law (Ireland) Acts. *This contention will by this decision* be finally set at rest in this country. The confusion, the misconception, which existed on this subject arose from applying feudal notions and definitions to statutes which were expressed in popular language. Demesne lands in the Land Acts mean what are popularly understood by demesne lands, and any person that has any experience of this country must know that there are several *residences and their surroundings* which pass as demesnes which are not held in fee."

That was the question raised in *Magner* v. *Hawkes* (1), and that was the question, and the *only* question *decided* in that case. Such, then, being the question to be decided, this Court (Fitz-Gibbon, L.J., dissenting) held, and I say held only, *that as between the landlord Hawkes and the tenant Magner*, the holding was demesne land within the meaning of sect. 58. But Mr. Healy, one of the counsel for the tenant, put, by way of argument, a question (which has frequently, in the argument of the case now before us, been referred to by the Lord Chief Justice as "Mr. Healy's question"), namely, whether, if the Hawkes were evicted by Tonson, would the holding be "demesne land" in the hands of Tonson? In my opinion that question did not arise before us. I entirely agree, and have always agreed, that it is a perfectly legitimate argument against any proposition, that such proposition, if accepted, would lead to some anomaly, or absurdity, or illegality, or the like, and I always regard with disfavour the answer often made to such argument, viz.: "When that case arises we will deal with it." But the argumentative question put by Mr. Healy was not of that character. The right of Mrs. Hawkes against her tenant Magner, if otherwise well founded,

(1) 32 L. R. Ir. 285.

was wholly independent of any consequent rights of Tonson. The question put by Mr. Healy, therefore, did not require any answer, or if it did, the answer might easily be, that if the holding was recovered by Tonson in ejectment, Tonson would get it into his possession in its "demesned" condition, and might so retain it, or use it, or let it, with all the incidents of "demesne" land under the Land Act.

In the report furnished to us of the judgment in the present case of the Land Commission Court Mr. Justice Bewley says:—

"In considering whether this is demesne land, I need only refer to one of the most recent cases on the subject, the case of *Magner* v. *Hawkes* (1), in the Court of Appeal. At one time, I think, there was an idea that lands could not be demesne lands for the purposes of the Land Acts unless at some period they had been the demesne of the landlord before the Court, or his predecessors in title, but any doubt on that subject is removed by the decision in *Magner* v. *Hawkes* (1), which shows that lands may acquire the character of demesne from the acts of the lessee or tenant, without any act of the head landlord."

In this passage the learned Judge with some, but not fully complete, accuracy describes the decision in *Magner* v. *Hawkes* (1), but he proceeds to quote, as expressing a further proposition *decided* by this Court in that case, certain passages in the judgment of the Lord Chief Baron, of which the leading one, as cited by Mr. Justice Bewley, from p. 304, is:—

"The right to have a fair rent fixed is a right given to the tenant in occupation of such lands as, at the passing of the Act, answered a particular description, and although, whether they answered that description, must usually depend upon the acts of particular persons, the lands are, according to the nature of those acts, either brought within, or excluded from, the Act, not *quoad those particular persons*, but as to *all persons* having estates therein."

That pronouncement of the Chief Baron, has been said by Lord Justice Fitz Gibbon, during the argument in the case before us, to be "extra-judicial" and I am of opinion, that it is so, using the

(1) 32 L. R. Ir. 285.

Appeal. 1894. PRATT, *Tenant;* GORMANSTOWN, *Landlord.* Barry, L.J.

word, not in the sense of *obiter dictum* but as meaning that although a *ratio decidendi* of the Chief Baron and therefore judicial, it expressed or involved a proposition not necessary for the decision of the question then before the Court. The Lord Justice expressed the same view of the Chief Baron's proposition when he said (as he did) that the point raised before us in this case is an entirely novel one. In that sense and in that sense only, if at all, can the term "extra-judicial" be applied to the opinion of the Lord Chief Baron, or rather to so much of it as was unnecessary for the decision of the Court on the question then at issue. But whether the term "extra-judicial" be or be not accurately applicable, so far as I am personally concerned, any opinion, judicial or extra-judicial, any *dictum* of the Chief Baron is ever regarded by me with the most profound respect, and if it had been adopted by the Court as its decision, or a branch or element of its decision, it is not, and could not, be denied that it would have decided this case against the tenant Mr. Pratt. But it was not adopted by the Court, and the Court decided, and decided only, the question of law raised in the case, namely, that the existence of a fee-simple estate in the landlord, or the predecessors in title of the landlord, *against whom the fixing of a fair rent was claimed by his tenant* was not necessary to constitute the holding "demesne" within the meaning of the Act. The Lord Chancellor (Lord Ashbourne) gave judgment, and having stated the facts, he says, at p. 294:—"We have heard the case fully argued. The first ground of argument was that these were not demesne lands, and secondly, that even if they were, in the progress of time they have become undemesned. First, was it demesne land? I am satisfied to take the definition of Sir E. Sullivan in *Griffin* v. *Taylor* (1). 'The true definition of demesne lands is lands held by the owner with the mansion-house.'" Then his Lordship refers to what has been called "Mr. Healy's question," as follows:—"Mr. Healy, with some ingenuity, presented another view: Suppose that Tonson the head landlord evicted the Hawkes family, are you prepared to hold that this is demesne up and down and that it would be demesne in Tonson's hands? *Suffice it to say that the Hawkes family were landlords in respect of the lease of* 1872; *they could make demesne out of this if they liked*, but if they were

(1) 16 L. R. Ir. 197.

evicted for non-payment of rent, that would not matter for their landlord when he came in." It has been said that this was an expression of approval by the Lord Chancellor of the opinion expressed by the Chief Baron. I cannot so understand it. It has been said by the Lord Chief Justice that this language of the Lord Chancellor is, at least, ambiguous. I do not think so; it seems to me perfectly intelligible, but at all events it can, by no possibility, be construed as an expression of adoption of the proposition of the Chief Baron, as interpreted, namely, that assuming that the tenancy of the Hawkes would have entitled them to ask the fixing of a fair rent against Tonson, the latter could resist it on the ground that Hawkes had made the holding *his* (Hawkes') demesne land. The Lord Chancellor goes on to say:—"I have already stated all that is known about the Hawkes family. They were men of moderate means, but they were in the position of gentry; and having regard to this and to the other circumstances I have mentioned, I am of opinion that the judgment of the Land Commission was right." Now the judgment of the Land Commission, which the Lord Chancellor pronounced to be right, is simply, that as between Hawkes, landlord, and Magner, tenant, the lands were demesne within the Act. The next member of this Court to deliver judgment in *Magner* v. *Hawkes* (1) was the Lord Chief Justice. I have already read the clear and unmistakeable language in which he described the question submitted for our decision. His Lordship says, at page 296:—"I entirely agree with what Mr. Justice Litton said on this matter when pronouncing the unanimous judgment of the Head Land Commission."

As I have already observed, the only question before the Land Commission was whether a tenancy in fee, as distinguished from a tenancy for years in the landlord, against whom the fixing of the fair rent was sued for, was necessary to entitle the landlord to establish that as against his tenant the holding was the landlord's "demesne" land. At page 297 the Lord Chief Justice said:—"In my opinion, the tenure is an element to be taken into consideration in determining whether the lands are demesne lands and no more. In the determination of that question all the circumstances of the particular case are to be taken into considera-

(1) 32 L. R. Ir. 296.

Appeal. 1894. PRATT, *Tenant;* GORMANSTOWN, *Landlord.* Barry, L.J.

tion; the tenure, the social position of the owner, the user, past, present, and contemplated, but above all the physical characteristics of the subject-matter; and once it is ascertained by regarding all these elements that any particular denomination of lands are demesne lands, they must be dealt with as such *in relation to any person having an estate or interest in them, whether owner in fee, middleman, or sub-tenant.*" These concluding words of the Lord Chief Justice's judgment are not referred to by Mr. Justice Bewley, possibly because, having regard to the general tenor of his Lordship's judgment, they were open to the construction that whether the landlord was owner in fee, or only a middleman, the lands may be demesne against the tenant, but the Lord Chief Justice has stated that by that passage he intended to express a view in accordance with the opinion of the Chief Baron, and therefore the high authority of his opinion is to be added to that of the Chief Baron.

Then I come to the judgment of Fitz Gibbon, L.J., and he deals solely with the question whether an estate in fee-simple in the landlord against whom the fixing of the fair rent is claimed or his predecessors was necessary. At page 309, he says:—"In my opinion, the policy and language of the Acts, the principles of justice, and the company in which 'demesne land' is found in the exceptions, all point to the same distinctive idea, and indicate some idea of reserving *the landlord's power to resume the actual occupation in connection with his own residence* as the criterion." Further down on the same page he says: "From all this I deduce what I said in *Griffin* v. *Taylor* (1), 'demesne land' to come within the exception, must at some time *have been legally 'demesne,' in the landlord's hands and must have been let so as, notwithstanding the letting*, still to show some contemplation of their being capable of *resuming* the character of demesne land at the expiration of the tenancy. Actual intention to resume may not be necessary, but the intention to retain the power of *re-occupying* the land as 'demesne land' is the very least, that in my opinion must exist, unless we are to deprive the legislation of any definite meaning whatsoever. I do not see how land held by a tenant

(1) 16 L. R. Ir. 197.

can be 'demesne land' *of the landlord* in any intelligible sense, unless the idea of leaving it open at some future time to *the landlord to occupy it with or as his residence still clings to it.*" In my opinion it is impossible, to the degree of absurdity, to construe that judgment of Lord Justice FitzGibbon, pervaded as it is by the leading idea of *resumption* by the landlord of the occupation *in connection with his residence*, as a concurrence in the proposition assumed by the Land Commission Court to have been decided by this Court. Then there is my judgment, which is a short one, deciding merely that tenure in fee in the landlord is not necessary.

Thus, out of the five Judges of which the Court was composed, three never adopted the opinion of the Chief Baron, which is treated by the Court of the Land Commission as the decision of this Court. Notwithstanding anything said or done in *Magner* v. *Hawkes* (1), it would be open to Lord Ashbourne, if he were a member of this Court, and is open to me, to now assent to, or dissent from, the opinion of the Chief Baron. It is also open to my brother FitzGibbon, notwithstanding his views on the necessity of a tenancy in fee in the landlord, to hold that the logical consequence of the decision in *Magner* v. *Hawkes* (1) must be to adopt the Lord Chief Baron's opinion, and to regard, should it become necessary, such consequence as furnishing a sort of *reductio ad absurdum* to demonstrate that the decision of the majority of the Court in *Magner* v. *Hawkes* (1) was wrong. So far as I am personally concerned, I am not, as at present advised, prepared to assent to the opinion of the Lord Chief Baron; the strong inclination of my opinion at present is, that a holding to be "demesne" land within the exception in the Act must be (or have been) "demesne land" *of the landlord against whom the fair rent is sought to be fixed, or his predecessors in title.* In other words, I agree with the description of "demesne land" given by my brother FitzGibbon in *Magner* v. *Hawkes* (1), save where he holds that the creation of a demesne must have originated with a tenant or tenants in fee-simple. As to whether the opinion of the Lord Chief Baron, as quoted and relied on by Mr. Justice

(1) 32 L. R. Ir. 285.

Appeal. 1894.

PRATT, *Tenant;* GORMANSTOWN, *Landlord.*

Barry, L.J.

Bewley, be right or wrong, I give no opinion. I only object to the opinion of any Judge, however eminent, being assumed to be the decision or *ratio decidendi* of this Court, unless accepted as such by the majority of the members presiding. It may be said that there was no categorical dissent from the Chief Baron's opinion expressed by any of the other four Judges; but it would be (and often has been) productive of great confusion and uncertainty if, in any Court, each Judge, not content with discharging his duty of deciding the question submitted for determination, and giving (where necessary) his reasons for his conclusion, should engage in a collateral discussion on other propositions unnecessary for the forming of his own opinion on the case before him. It was of course open to the Land Commission Court, if they arrived at such a conclusion, to decide that the logical consequence of the judgment of this Court was to compel them to hold or to justify them in holding that under such circumstances as exist in this case the landlord (Lord Gormanstown) could rely as against the tenant (Mr. Pratt) on the exception of "demesne" lands in the 58th sect. as an answer to the application to have a fair rent fixed; but the Court of the Land Commission was in no sense warranted in holding that such was the *decision* of this Court.

Mr. Meredith for the landlord seemed to me to, very delicately, if at all, argue in favour of the proposition that this case was *decided*, directly or indirectly, by *Magner* v. *Hawkes* (1), but at the close of his argument he relied on the very excellent judgment of that able Judge, Mr. Justice Bewley himself, in *Allen* v. *Grogan* (2), which has been adopted by the Lord Chancellor as the ground of his decision in this case. I take the same ground. I adopt that decision of the learned Judge as sound and sensible, and a wholesome protest (so far as may be) against the abuse of the Act of Parliament which would arise in permitting a man in Mr. Pratt's position, under the circumstances, to pose as an over-rented farmer. I am of opinion that the decision of the Land Commission should be affirmed, not on the ground that the question was *decided* by *Magner* v. *Hawkes* (1), which it was not, but on the principle of *Allen* v. *Grogan* (2), a principle, however,

(1) 32 L. R. Ir. 285. (2) 32 L. R. Ir. 179.

which must be applied with care and caution, having regard to the clearly established facts of each case.

Appeal. 1894.

PRATT, *Tenant*; GORMANSTOWN, *Landlord*.

Solicitor for the tenant: *T. Y. Chambers.*
Solicitor for the landlord: *T. T. L. Overend.*

R. D. M.

WHITE, TENANT; WHITE, LANDLORD (1).

Appeal. 1893. Dec. 12. 1894. Feb. 2.

Lessee bona fide *in occupation—Subletting to labourers—Subletting of a trivial nature—Rent paid in labour—50 & 51 Vict. c. 33, s. 4.*

W., the lessee, under a lease for three lives, was in occupation of the lands demised, which comprised 162 acres statute measure, with the exception of three small portions sublet to agricultural labourers. The sub-tenants were (1) L., who had a cottage and 2½ acres; (2) W., who had a cottage and 2 acres; and (3) S., who had about half an acre. No money rents were paid by the sub-tenants; but they gave three days' labour a-week to the lessee W. in return for their holdings. Labourers were necessary for the farm:—

Held (reversing the decision of the Land Commission), that the sublettings were trivial, and the lessee must be deemed to be substantially in occupation of his holding.

THE lessee, Edward Richard White, held the lands of Conricainade, near Bantry, in the county of Cork, consisting of 161 acres, statute measure, from Robert Hedges Eyre White, under lease dated the 10th January, 1849, for the term of three lives, at the rent of £50.

There were three sub-tenants on the holding, Michael Linehan, who held a cottage and about 2½ acres, William White, who held a cottage and something over 2 acres, and Thomas Sullivan, who had a small half acre: in addition, Linehan and White had the right of pasturing a cow on some mountain pasture belonging to their landlord, Edward R. White. These men were all agricultural labourers, working on the lands, who paid for their holdings by means of their labour, the arrangement being that they were to give three days a week labour in return for the occupation of their

(1) Before WALKER, C., and FITZGIBBON and BARRY, L.JJ.

Appeal. 1893. WHITE, *Tenant;* WHITE, *Landlord.*

land. The farm was of such a nature that it required labourers, furzy land; the labour of Linehan was counted as worth 8*d.* a-day, and of Sullivan as worth 10*d.* a-day: they settled accounts with Mr. White, the lessee, every week.

The Sub-Commissioners fixed a fair rent at £30. On the 22nd June, 1893, the Land Commission reversed the decision of the sub-Commission, and dismissed the originating notice. From that order the tenant appealed.

R. M. Hennessy (with him *Seymour Bushe, Q.C.*), for the tenant.

G. Wright, Q.C., and *P. D. Fleming*, for the landlord.

1894. Feb. 2.

Cur. adv. vult.

WALKER, C.:—

The lands are held under a lease of 10th January, 1849. The litigants are uncle and nephew, and the question is whether the lessee was in *bona fide* occupation of the lands when he served his notice. The existence of certain sub-tenancies is admitted, and it is not alleged they were made with consent within the meaning of the Act of 1881. What we have to decide is whether within the meaning of sect. 4 of the Act of 1887 they are of trivial character, and we can deem the tenant to be substantially in occupation of the holding.

The facts are not in dispute. The lands demised amount to 162 acres statute, and there are three sub-tenants. One Linehan has $2\frac{1}{2}$ acres; a second, White, has 2 acres; and the third, Sullivan, $\frac{1}{4}$ acre. Linehan and White have houses, and, in addition to the lands they occupy, they have certain freedoms over the lands of the landlord.

The rent payable by the tenant White is £50 per annum. No rent in money is payable by the sub-tenants. They each give three days a-week in labour as a return for their occupation. Linehan's labour is estimated at 8*d.* a-day, and each of the others at 10*d.* They are paid in cash for their labour at the same rate for the remaining days of the week, and accounts are settled every Saturday. The lands are mountainy, furzy land, requiring a good deal of labour, and at least three labourers would be required

for the working of it. If the value of the tenants' labour be estimated in money, it would be about £10 5*s. per annum.*

Several questions were argued before us. I am of opinion and assume that the occupation of Linehan, White, and Sullivan was not in any case the occupation of the employer. I have read the able judgment of Mr. Trench, the legal sub-Commissioner, and on this point he has satisfied me that his reasoning is correct. There is a difference when a man occupies as part remuneration for his services, and when the occupation is subservient to and necessary for the service.

But the questions remain whether the sublettings are—1, excluded by the terms of sect. 4 of the Act, 1887, and, 2, whether they come within the second branch of that section as within the words "when the subletting is of a trivial character, and the Court deems the tenant to be substantially in occupation of the holding"? On the first point the letting to Sullivan would apparently be saved by the first branch of the section, but that does not dispose of the question, as each of the other lettings exceeds half an acre in extent.

In my opinion the second branch of the section must be deemed an independent enactment, otherwise, if there was one tenant labourer on a farm of 300 acres whose holding was three-fourths of an acre, the question of triviality under the second branch could not arise. The limitation of the half acre must be referred to the Labourers' Acts, and *qua* labourers no protection can exist when the half acre is exceeded. But I do not think that excludes the application of the second branch, where it otherwise applies.

The application of the second branch of the section in each case depends on a question of fact, which involves a finding (*a*) that the subletting is of a trivial character, and (*b*) which I think in some cases may be an addition, and is in all a sort of explanatory consequence, and a governing feature, viz. that the tenant is substantially in occupation of the holding. The main object, of course, was to get rid of the difficulty created by the cases of which *Maconchy* v. *Robertson* (1) is a leading example. I

(1) 18 L. R. Ir. 483.

Appeal. 1894. WHITE, *Tenant;* WHITE, *Landlord.* Walker, C.

think, therefore, we are referred to the facts of this particular case for our decision in this, and no one case can be a certain guide for a decision on another.

The question which I propose to myself on the case is, Is the tenant substantially in occupation of the holding? He is not in occupation physically of $4\frac{3}{4}$ out of 162 acres, but these are occupied by three labourers, whose rent for the necessary purposes of working the farm he allows to go in labour for three days of the week, and whom he pays for the three remaining days. There are weekly rents and weekly settlements. He could not usefully occupy without employing at least a like number of labourers. The only difference is, that instead of occupying the whole, and keeping them for six days in the week, he pays them for three, and lets their occupation go against the remaining three days. Thus the element of the necessary working of the farm, in order that the tenant may occupy usefully, taxes the place to the extent of the $4\frac{3}{4}$ acres of his own occupation. These labourers are not separately rated, and their taxes are paid by White.

It is true that the labour worth in the three cases amounts to £10 5*s.* per annum, and the rent is £50, but I do not think that is like the case of *Kennedy* v. *Essex* (1), nor do I think the case can be decided by the circumstance, for instance, that one quarter acre of a farm was let relatively at a large rent for special reasons. Each case must depend on its own facts. In *Kennedy* v. *Essex* (1) there were six houses sublet—one a public-house—and also at the date of the application two acres at a rent of £8. Those sublettings were wholly foreign to the working of the farm, and on the words "substantially in occupation of the farm," I think the subletting in *Kennedy* v. *Essex* (1) should not be deemed as determining the case against the tenant in the present one.

I do not at all quarrel with the decision of the Land Commission in this case, having regard to the authorities, and I observe their decision was arrived at with doubt. Applying the test whether the tenant is substantially in occupation of his holding, I am of opinion on the facts of this particular case that he is, and therefore that the order of the Land Commission should be dis-

(1) 28 L. R. Ir. 586.

charged, and the appeal allowed which in effect restores the order of the Sub-Commission. The costs will follow the result.

Appeal. 1894.

WHITE, *Tenant;* WHITE, *Landlord.*

FITZ GIBBON, L.J.:—

I agree, and I think it necessary to add only some general remarks on the 4th section of the Act of 1887. The relation between the two clauses is important. The first clause is mandatory:—"A tenant *shall*, for the purpose of the Land Law (Ireland) Act, 1881, and of this Act, be deemed to be in *bona fide* occupation of his holding, notwithstanding that he has sublet part thereof, provided the subletting is for the use of a labourer or labourers *bona fide* employed and required for the cultivation of the holding, and the Court deems such subletting reasonable, and sanctions the same." "The land comprised in each such letting shall not exceed half an acre in extent, and the Court shall have regard to the size and character of the holding, and may prescribe such terms as to rent and otherwise with regard to the part sublet as it thinks fit."

The whole clause deals with a specific matter, subletting to labourers, and where the prescribed conditions are fulfilled it operates directly, and prevents the subletting from affecting the tenant's occupation for the purposes of the Land Acts.

The second clause, on the contrary, is altogether optional, and deals with a subject of judicial discretion:—"A tenant *may also* be deemed in occupation of his holding, notwithstanding that part is sublet; where the subletting is of a trivial character, *and* the Court deems the tenant to be substantially in occupation, and the Court may prescribe like terms," &c.

The first point made by the landlord was that no subletting to a labourer could be dealt with at all, unless it came within the precise terms of the first clause. I cannot follow that. The mandatory enactment can apply only to such labourers' sublettings as come within its precise terms, but I cannot agree that no subletting to a labourer can be brought within the second, or discretionary clause. Each clause must have its own effect, and the second can be applied to a subletting to a person who is a labourer, as well as to anyone else. It would be absurd to say that if a perch more than half an acre is sublet to a labourer, it cannot be of a trivial character, and the Court cannot deem the tenant to

Appeal. 1894.

WHITE, *Tenant;* WHITE, *Landlord.*

Fitz Gibbon, L. J.

be substantially in occupation, though it would be otherwise if the sub-tenant was not a labourer.

Upon the second point, the construction of the second clause, I think its two provisions are not cumulative, but correlative. In determining whether the subletting is trivial, the Court should look to whether the tenant is substantially in occupation, and in determining whether the tenant is substantially in occupation, it should consider whether the subletting is trivial. It is, in each case, a question of degree, a relative question, upon which all the circumstances are to be considered. I can conceive cases in which the subletting of 4 acres, even out of 162, could not be regarded as trivial; the 4 acres might be valuable, or of special importance to the occupation of the holding as a whole; but the character of the subletting is not, in my opinion, to be left out of consideration in determining whether the tenant is, notwithstanding, substantially in occupation.

The tenant here has parted with possession of these 4 acres, but the tenure, so far as the sub-tenants are concerned, binds them to discharge duties connected with the tenant's occupation of the rest of the land, and therefore, in a sense, their occupation interferes less with the substantial occupation of the holding by the tenant than if they were not labourers.

The real question is whether, notwithstanding these sublettings, the tenant is, in this case, substantially in occupation of the entire holding, and I think he is. *E converso*, I think that because the tenant here is substantially in occupation of the entire holding, we can hold that these sublettings are trivial. But "trivial" is a very restrictive term, and strict effect must be given to it, and, except under special circumstances, it will be difficult to hold that a subletting to an under-tenant which, considered in itself, and by itself, is not trivial, can be deemed consistent with substantial occupation by the mesne tenant.

BARRY, L.J.:—

I have nothing to add. I agree in the view taken by the Lord Chancellor and Fitz Gibbon, L.J. This case is not to be determined as a matter of proportion, if you find 3 acres one way and 5 another. I think the real question is, is the tenant sub-

stantially in the occupation of his holding? I think that is not exactly a question of law, but more a question of fact; and I am of opinion that, having regard to the circumstances under which these under-tenants are in possession of these plots of land, the tenant is substantially in occupation of his holding.

Appeal. 1894.

WHITE *Tenant;* WHITE, *Landlord.*

Solicitor for the tenant: *Downes.*

Solicitor for the landlord: *Wright & Son.*

R. D. M.

PERRY, TENANT; FARLEY, LANDLORD (1).

Appeal. 1894.

May 4

Agricultural or pastoral holding—Land Law (Ireland) Act, 1881, *section* 58, *sub-section* 1.

A holding consisted of one acre, situate on the South Circular-road, Dublin, within the municipal boundary. It had formerly been held by the same tenant, along with another acre of land, but the latter portion had been taken by another person, who had let it out as a receptacle for dust and refuse. The holding had been used for agricultural purposes:—

Held (reversing the decision of the Land Commission), that the holding was not one to which the Land Law (Ireland) Act, 1881, applied.

THE holding originally consisted of about 2 acres (statute measure), which the tenant took about the year 1858 from one Coffey. It was situated on the South Circular-road of the city of Dublin, and the footpath in front of it was a concreted pathway, and there were gas lamps along the road. It was within the municipal boundary, so far as taxation was concerned. About 100 yards off stood the building, known as the St. Patrick's Home for the Poor, and beyond that was the Royal Hospital of Kilmainham, and the South Dublin Workhouse. The tenant lived at Crumlin, about a mile and a quarter away. Coffey, who was a middleman, holding under the Domvile family ceased to be tenant, and about 1888, a man named Barrett was accepted as tenant of one-half of the holding by the head landlord. The entire rent for the 2 acres was originally £12.

(1) Before PALLES, C.B., and FITZ GIBBON and BARRY, L.JJ.

Appeal. 1894.

PERRY, *Tenant;* FARLEY, *Landlord.*

After half the holding was taken by Barrett, Perry's rent was reduced to £6 10*s.*, Barrett had let out his acre as a receptacle for dust and refuse.

The Sub-Commissioners fixed a fair rent; the Land Commission affirmed the decision, and the landlord appealed.

Campbell, Q.C., for the landlord.

Teeling, for the tenant.

PALLES, C.B.:—

In the view which I take of this case, the only question which it is necessary to determine is whether the holding is one to which the Land Act of 1881 applies. This holding is not only situated within the municipal boundaries of the city of Dublin, but it abuts upon one of the streets, the South Circular-road, which is paved and lighted. Upon the same side of this street, both above and below the holding in question, but at certain distances from it there are, and as I understand the evidence, there were in 1881, inhabited buildings, the auxiliary workhouse upon the one hand, and buildings in Kilmainham upon the other. In extent, the holding is an English acre, and it is of a form, as appears from the map and from the Assistant Commissioners' Report, suitable for the erection of such a house as would probably be built in such a locality. The holding adjoining it is used as a dust heap, but it appears that the period at which it was first so used was subsequent to 1881. For many years the holding has been used as a market garden.

The Act does not apply to any holding which is not "agricultural or pastoral in its character, or partly agricultural and partly pastoral (1)." These words are identical with those in section 71, of the Landlord and Tenant Act of 1870, which is *in pari materiâ* with that of 1881. The Act of 1870 also contained in its 15th section a provision that compensation should not be payable under the previous sections in respect of town-parks, which are described in words identical with those in section 58, sub-sect. 2, of the later Act, and one of the characteristics of which is that it must bear an

(1) Section 58, sub-section 1.

increased value as accommodation land "over and above the ordinary value of land occupied *as a farm*." Shortly after the passing of this Act it was determined by the special Court of Appeal constituted by it, in *Carr* v. *Nunn* (1), that the mere fact that its greater part was used for growing agricultural produce, or for the depasturing of cattle, did not necessarily bring the holding within the Act. The question there was in relation to a villa residence, consisting of a house and 8 acres of land attached, of which six acres formed a lawn, and the remainder, with the exception of half an acre, which was in tillage, was under the house and garden. Lord O'Hagan, in giving the unanimous judgment of the Court, said, "We do not mean to determine that 8 acres might not constitute an agricultural or pastoral holding, or that, under certain circumstances, a much smaller piece of land, consisting of four, three, or even two acres, might not be properly considered as such. We have to regard the nature and extent of the property, the object for which the tenancy commenced, and the use which the tenant has made of the tenement, in order to determine the nature and character of the holding." During the argument of the case, Mr. Baron Dowse put the question thus to counsel, "You contend that the real question is whether it is a villa residence with accommodation land, or a *farm* with a house on it."

Again, in *Doyne* v. *Campbell* (2), the same question arose in reference to a holding which consisted of 25 Irish acres, 10 of which were under the house, offices, gardens and ornamental grounds, and the remaining 15 acres of which were regularly fenced fields, used exclusively for pasture. Mr. Baron Dowse, in giving judgment, repeats his former question, "Is this a holding agricultural or pastoral in its character, or partly agricultural and partly pastoral? *Is it a farm*, with a house on it suitable to the amount of land comprised on the holding; or is it a villa residence or mansion, with demesne or accommodation land attached to it?" "The answer" to this question "when given denotes the character of the holding."

These two cases, which since have been uniformly followed, excluded residential holdings from the operation of the Act of 1870

(1) Ir. R., R. & L. 89. (2) Ir. R. 9 C. L. 95.

Appeal. 1894. PERRY, *Tenant*; FARLEY, *Landlord.* Palles, C.B.

by ascertaining from the entire Act the meaning in the view of the Legislature of the expression "agricultural or pastoral in its character"; and in substance decided that a holding, to be within the Act, should be a farm. This construction was settled and well known when the Act of 1881 was passed. That Act excludes from its operation, tenancies which are described in the same words as those which, to the knowledge of the Legislature, had been thus previously construed. The Act, by section 58, is not to apply to "tenancies in any holding (1) which is not agricultural or pastoral in its character, or partly agricultural and partly pastoral"; by sub-sect. 2 of the same section there is an exclusion of town-parks, which are described in the same words as are contained in section 15 of the earlier Act. We are therefore, by the ordinary rules of construction, bound to construe the words "a holding which is agricultural or pastoral in its character" in the sense which had been judicially attributed to the similar words in the previous Act, *i. e.* as "a *farm.*"

I proceed, therefore, to consider the question of pure fact: whether, under the circumstances of this particular case, the holding can properly be described as a farm?

I take, first, the fact that it is within the municipal boundary of the city of Dublin, and that the landlord, by reason thereof, is liable to pay city rates. I do not think that this circumstance is conclusive. There may be, and I believe there are, in many parts of Ireland, municipal towns, the boundaries of which extend far out into that which, in ordinary language, would be deemed "country," as distinguished from "town"; and I am not to be taken as determining that a holding within such a district, might not be within the Act of 1881. But this particular holding is not only within the municipal limits, but is one which, having regard to its situation as already stated, must, in my opinion, be held as a matter of fact, to be in "town," irrespective altogether of municipal limits, and using that word, as I have already used it, in contradistinction to "country." It is distinctly urban, and not rural. It is, in fact, a town building-plot, which, pending a demand for it as such, was used as a market garden. Can such a holding with propriety be said to be a farm? As to the effect of its locality upon this question, I deem it material to refer to

another of the characteristics of town-parks, as prescribed by section 58, sub-sect. 2. They must be "adjoining or *near* to any city or town": words which *prima facie* do not include holdings *within* a city or town, although if such latter holdings would otherwise have been within the Act, there would have been the same, if not much graver, reasons for excluding them than could apply to holdings which only adjoined or were near to, but not within, the city or town.

This, I think, indicates that it was not present to the mind of the Legislature that there could be a farm within a "city or town," using these words as meaning, not the entire district within the municipal limits, but the portion which in fact answers the description of "city or town," as distinguished from "country," the urban, as distinguished from the rural district. At present it is not necessary that I should determine that no holding situated within this district could be one to which the Act applied; but I hold, without any doubt, that the locality of the holding being within the urban district is one of the several circumstances which the Court is bound to take into consideration in determining its character. Accordingly, following the decisions that the Act relates solely to farms, and taking into consideration the urban locality of this holding, I hold that it cannot with any propriety be deemed a farm, and that consequently it is one to which the Act does not apply.

As the Limerick Market cases have been referred to, I deem it right to say that I am not to be taken as expressing any opinion in reference to them. They were, I assume, determined on their own facts, and those facts are not the same as those in the present case. But I cannot hold that every market garden *is* of necessity a farm, although I agree that there *may be* market gardens of such extent, and used in such a way, as properly to come within that term.

In my opinion the appeal should be allowed, and the originating notice dismissed, with costs.

FITZ GIBBON, L.J.:—

I am not without misgiving as to this decision, not as to the soundness of the principle which we are now applying for the first time, nor as to the justice of its application to this particular case,

Appeal. 1894.

PERRY, *Tenant:* FARLEY, *Landlord.*

Fitz Gibbon, L.J.

but as to whether it is not a decision which is likely to be misunderstood or even misinterpreted, and misapplied, as other decisions of this Court have been, to cases where the facts are not the same.

There are one or two matters which we assume in favour of the tenant. We assume, in the first place, that he had "a present tenancy" in this plot of ground, a direct tenancy between himself and the owner of the Domvile estate, and not merely a subtenancy under Coffey, at the date of the passing of the Act of 1881. Upon that point we have had the additional evidence of the receipts and letter of the landlord's agent, Mr. Owen, which will be entered on our order. But upon that assumption a material observation arises against the tenant upon the question of fact as to the character of the holding, so far as the mode of dealing with it can throw light upon that question—If Perry has had a "present tenancy" ever since 1881, it is a very significant circumstance that he never served an originating notice until the place was advertised for sale as building ground by the landlord.

I also assume in favour of the tenant that the *use* of this holding is "agricultural," within the meaning of the Land Acts. I guard myself from saying that every "parcel of land" used for growing vegetables is necessarily "agricultural" in character, far less that it is "used as a farm." But this tenant is a market gardener by trade, this plot is not all the land which he cultivates for business purposes, and a market gardener seems to me to be an agriculturist. If a man holds 20 acres of land, and works the whole as a farm, I don't think the "agricultural" character of the several fields, which make up the farm, can be affected by their being held under several contracts of tenancy, or held under only one. I think the character of the holding, and of each plot of land occupied by the tenant, is to be determined upon all the circumstances; the fact that the tenant holds distinct plots is to be taken into consideration, but it is not conclusive; a piece of land may be all in the occupation of one man, and used as one farm, though taken and held in bits, any one of which, in itself and by itself, could not be described as a farm, and in such a case I do not think the separate holdings would be excluded from the Act as not being "agricultural." But, on the other hand, the

same man may hold and cultivate a number of separate scraps of land, not one of which will be really "agricultural" in its character. Applying these observations to the present case, this acre was originally occupied with an adjoining acre, which was given up apparently without any suggestion that it was an agricultural holding, and put to the most urban of purposes, being converted into a dust heap, or spoil bank for city refuse. *Noscitur a sociis;* how is this acre more "agricultural" in character than the adjoining one, which was treated as outside the Act? Furthermore, it is a detached plot, and though Perry cultivates other holdings elsewhere, the character of this scrap of land must be judged by itself, for there is no evidence that it has ever been used in connection with any other, since the dust-heap was taken up.

The principle of our decision is analogous to that of the decisions on "residential holdings." The Chief Baron has remarked, with persuasive force, that these decisions were first made upon the Act of 1870, and the Act of 1881 was passed with knowledge of the fact that agricultural land was judicially excluded, if it was not the predominant element in a holding of which the general character was "residential." There is clearer ground for excluding "urban" holdings. The distinction between town and country, in every relation of human affairs, is more marked than that between "farms with houses on them," and "houses with land attached."

The Lord Chief Baron has referred to some of the cases decided on the subject of residential holdings. I think the essential characteristic of the holdings which were intended to be brought within the Land Acts very conspicuously appears in the statutory conditions which attach to them, when a fair rent is fixed. For example, by the Act of 1881, sect. 5, sub-sect. 2, it is enacted that "the tenant shall not, to the prejudice of the interest of the landlord in the holding, commit persistent waste by the dilapidation of buildings or, . . . *by the deterioration of the soil.*" I think that it is essential to every holding within these Acts that the soil occupied by the tenant shall be regarded in its character *as a productive agent;* and if its use or enjoyment is for other purposes than the raising of natural products in the shape of crops or grass, I

Appeal. 1894.

PERRY, *Tenant*; FARLEY, *Landlord.*

Fitz Gibbon, L. J.

think it lacks the necessary characteristic of a holding within the Acts.

No doubt, during the continuance of a statutory term, the landlord may resume an agricultural holding for building ground, and the real question is only, Whether this is a holding which the landlord may take up without paying compensation? But that only affects certain questions of consequences as to arresting improvements and the like. We have still to find, as a fact, that it is a holding agricultural in character, and within the Land Acts, and that the landlord is liable to pay compensation if he takes it up. On this question the burden of proof is on the tenant, who comes in to prove that he has a holding "agricultural in its character." It is not *agricultural* if it is *urban*. Sect. 58, sub-sect. 2, appears to me to contain a negative pregnant, which shows these terms to be mutually exclusive—"Any holding ordinarily termed 'town-parks,' *adjoining or near to* any city or town." Unless this excludes holdings *in* any city or town, we should reach the absurdity that a town-park at the country side of the city boundary would be out of the Act, when a similar holding at the city side of the same boundary would be within it, and might have a statutory tenancy and fair rent fixed upon it. I am satisfied that all holdings in cities or towns were assumed to be outside the Land Acts. Let me not be misunderstood. By "in a town" I don't mean inside some imaginary line, such as exists in Sligo or Galway, where a "municipal boundary"—fixed for franchise or rating purposes—may extend for miles into the open country; but taking common language in its popular sense, this holding of Perry's is, in my opinion, "in the city"; it is an "urban holding"; it distinctly has a *town character;* it has nothing of an agricultural character beyond its temporary use for growing cabbages. Look at its surroundings. The workhouse sheds, the Hospital of the Little Sisters of the Poor, the Royal Hospital, terraces of houses and the like, are its neighbours. All these are significant, but not so strong as the paved pathway that runs in front of it, the gas lamps and the sewers, and what touches the case more nearly still, the liability to payment of the municipal rates which are assessed upon the very holding itself.

Appeal. 1894.

PERRY, *Tenant;* FARLEY, *Landlord.*

Fitz Gibbon, L.J.

The Chief Baron has felicitously described it as a building plot let for a market-garden, pending its being taken for building. Its extent, shape, and frontage, its rent and valuation, the fate of the dust-heap plot, all point to the same conclusion. I remember, in my younger days, seeing cabbages growing on vacant plots in Upper Gardiner Street, Hatch Street, and even in Fitzwilliam Place. Did it ever occur to anyone that the character of these holdings was agricultural, because vegetables were grown upon them while the landlords were waiting for someone to come and build upon them? When the Act of Parliament uses popular language, its popular language ought at least to be popularly construed.

There is one other matter to which I must refer. A decision of this Court is always being brought up, in season and out of season —"The Strawberry Bed Case," as it is called—and it is generally quoted as if we had held that every strawberry bed is an agricultural holding. The Limerick market-garden cases, and others, are said to have been decided on the authority of this "Strawberry Bed Case." The holding in that case was more than 7 acres in extent; though a small part of the land, about 1 acre, was under strawberries every year, other parts of it were used to grow oats, potatoes, vegetables, and other agricultural crops. The whole was distinctly a farm, well tilled by a tenant who lived by farming it. It was three or four miles from Dublin. It was within the district, some three miles long, known as the Strawberry Beds, and from that it has got the name of "The Strawberry Bed Case." That is, with all respect, the sort of thing I want to guard against, when I say that decisions such as this are liable to misinterpretation, and are misapplied. One man who tills his land is to be within the Acts, because he grows one kind of crop, while another, who grows some different crop, is to be out of them on that account. Horticulture is different from agriculture, though if we went to etymology we should look to the enclosure of the garden as being its essential difference; but there is such a thing as "garden-farming," and in every separate and individual case where the character of the holding, as a whole, is at issue, the decision must be based upon all the particular circumstances, and will rule no other case, unless all the same circumstances, and no

Appeal. 1894. PERRY, *Tenant*; FARLEY, *Landlord.*

others, occur again. In this case the circumstances establish, to my complete satisfaction, that according to all popular understanding, justice, and common sense, Perry's holding is not agricultural in its character. I decide that, and nothing else.

BARRY, L.J.:—

I concur in the opinions, expressed by my learned colleagues, which establish successfully a protest of common sense against the application of the Land Acts to cases which could not have been within the intention of the Legislature.

The Acts were passed for the benefit of those who may be described, in a general phrase, as the order of working farmers of the country, to confer on them security of tenure, and protection from unfair rents. We have had, however, from the frame and language of the Acts, to extend their provisions to persons and circumstances never contemplated by Parliament. The first revolt of the Court against this misapplication of the beneficent intention of the Legislature was the establishment of what is known as the "residential holding" exception. That exception to the application of the Act was founded in reason, and has been, I believe, universally so recognised, and was based, not upon any express words in the Act, but upon a view of the whole tenor and intention of the Acts, to be derived from their language.

The land attached to the residence was undoubtedly "pastoral or agricultural" in fact, but it was held not to be such *within the meaning of the Acts*, because the circumstance that the predominance of the "residence," as the subject of the contract of tenancy, rendered the holding not to be "agricultural or pastoral," in the legislative meaning of the words. The importance of that decision to the present case is that it shows that the Court may hold, on the whole purview of the Act (of course founded on the particular circumstances), that land, though actually agricultural or pastoral, may not be held to be so within the meaning of the Acts.

We have now before us a perfectly new point, namely, whether a small plot of ground in the city of Dublin, assuming it to be in its quality and user agricultural or pastoral, is a holding excluded

from the operation of the Act. As the Chief Baron, and my brother Fitz Gibbon, have pointed out, in the provision as to "town parks" the Acts deal with holdings "adjoining or near to any city or town." The Acts do not mention land *in the town*. Obviously, or at least for no other assignable reason than, because it was not contemplated that such a holding would be at all within the Acts.

Why make an exception for a holding outside the town because of its connection with a tenant in the town, if a holding absolutely within the town was to have all the incidents of the most distant farm?

On the whole, having regard to the entire scope, purview, and intention of the Act, as manifested by its frame and language, I am of opinion that this holding, and I confine myself to this holding, and the facts proved respecting it, is not within the Act. I give no opinion as to the Limerick or the Strawberry Bed Cases. The former never came before this Court, and my brother Fitz-Gibbon has shown that the facts were wholly different from the present case.

Solicitor for the tenant: *P. C. M'Gough.*
Solicitor for the landlord: *James Goff.*

R. D. M.

Appeal.
1893.
Dec. 19, 20.
1894.
Feb. 24.

CONROY, Tenant; MARQUIS OF DROGHEDA, Landlord (1).

Landlord and tenant—Land Law (Ireland) Act, 1881, *sect.* 20—*Present tenant—Surrender of present tenancy—Future tenant—Resumption of possession by landlord—Determination of tenancy—Reverter.*

At the time of his death, in 1881, C. was tenant, under the same landlord, of two farms—T., containing 61 acres (Irish), subject to a rent of £67 10*s.*, and M., containing 37 acres (Irish), subject to a rent of £31 19*s.* 6*d.* On C.'s death T. and M. passed to his widow, who retained possession of T., and put C.'s brother in possession of M. In 1884 the landlord recovered possession of M. for non-payment of rent. In 1885 C.'s widow signed a proposal to become tenant of her "old holding" T., together with 10 acres (Irish) of M., "as one holding," subject to a bulk rent of £75. This proposal was accepted by the landlord, and C.'s widow went into possession of the additional 10 acres without giving up possession of T. to the landlord, and she thenceforth paid the bulk rent of £75. C.'s widow served an originating notice, seeking to fix the fair rent of all the lands comprised in the proposal. The Sub-Commission struck the 10 acres (Irish) of M. out of the notice, and fixed a fair rent on T. The Land Commission affirmed this order of the Sub-Commission:—

Held (affirming the decision of the Land Commission), that on the terms of the proposal, and under the circumstances in which it was made, the tenant did not intend to surrender her "old holding"; that in the absence of such intention the "old holding" had not been surrendered; that in making and accepting the proposal the two parties were not *ad idem*; that therefore there was no new contract creating a future tenancy, and accordingly the tenant was entitled to fix the fair rent of T., and was liable in use and occupation for the 10 acres (Irish) of M.

Semble, without resumption of possession by the landlord, a present tenancy may be determined by a surrender implied by reason of the tenant accepting a new estate inconsistent with such present tenancy.

M'Donnell v. *Blake* (28 L. R. Ir. 395) explained.

Jackson v. *Hagan* (28 L. R. Ir. 326) dissented from.

Appeal by the landlord from an order of the Land Commission, dated July 14, 1893, affirming an order of the Sub-Commission

(1) Before Walker, C., Palles, C.B., and Fitz Gibbon, L.J.

whereby the originating notice was amended by striking out the lands of Mullaghanard therein mentioned, and a fair rent was fixed upon the lands of Teneille.

The main facts of the case appear from the judgment of Mr. Justice Bewley, which was as follows:—

"In this case it appears that in and prior to the year 1881, Thomas Conroy, who was the husband of the present tenant, Margaret Conroy, was tenant from year to year of the lands of Teneille, containing 61A. 1R. 6P. Irish plantation measure, equivalent to 99A. 1R. 3P. statute measure, at the yearly rent of £67 10*s.*; and this constitutes the holding mentioned in the order of the Sub-Commission in this case. He also had at the same time a holding in the adjoining or neighbouring townland of Mullaghanard, containing 37A. 3R. 35P. statute measure, at the yearly rent of £31 2*s.* 6*d.* He died in 1881, and his widow remained in occupation of the present holding, paying the rent for it. By some arrangement the brother of Thomas Conroy seems, with the assent of the widow, to have gone into possession of the 37 acre holding. However, in the year 1884 an ejectment to recover this holding was brought by the landlord, and possession was recovered. In 1885 Margaret Conroy sent in a proposal to the landlord to take her old holding of 61A. 1R. 6P. Irish plantation measure, with 10 acres of the other holding, which had been formerly in possession of her husband. The proposal was in these terms:—'I, Margaret Conroy of Teneille, Rosenallis, Queen's County, hereby propose and agree to become tenant to the Most Hon. Henry Francis Seymour, Marquis of Drogheda, for my old holding in Teneille, containing 61A. 1R. 6P. or thereabouts, together with 10 acres of the lands of Mullaghanard, or thereabouts, as one holding, from the 29th September, 1884, at the yearly rent of £75, payable half-yearly on every 25th of March and 29th September in each year, the first half-yearly payment to be made on the 25th March, 1885. And I also undertake to pay all cess and other taxes as heretofore.' That proposal was accepted by the landlord. Mrs. Conroy went into possession of the additional 10 acres, and since that date has paid this bulk rent of £75. Prior to the passing of the Land Law (Ireland) Act, 1881, there would have been a surrender of the old interest in the 61 acres,

Appeal. 1893. CONROY, *Tenant;* DROGHEDA, *Landlord.*

and the creation of a new tenancy in the enlarged holding. However, having regard to the terms of the 20th section, it now appears to be the law that a tenancy to which the Act applies can only be deemed to be determined whenever the landlord has resumed possession of the holding, and that without resumption of possession there is no determination of the tenancy, either by notice to quit or by what would otherwise be equivalent to surrender by operation of law. That was decided by us in *Jackson* v. *Hagan* (1). The same principle was laid down by the Court of Appeal in *M'Donnell* v. *Blake* (2), and also in *Montgomery* v. *O'Hara* (3). Under these circumstances we think the old tenancy in this portion of the holding has not been determined, and consequently the Sub-Commission were right in treating this as a still existing tenancy. The old rent of this portion was £67 10*s.*, and the judicial rent £54; and we now confirm the judicial rent."

Until the eviction of Mullaghanard in 1884, Mrs. Conroy paid the rent for, though her brother-in-law worked, and was in the actual possession of, the farm. After Mrs. Conroy got possession of the 10 acres Irish, the remainder of Mullaghanard was let to a man named Scully. No legal representation was taken out to Thomas Conroy. At the hearing before the Land Commission the tenant deposed to the circumstances under which she signed the proposal to take Teneille and the additional 10 acres. Her evidence is stated in the judgment of the Lord Chancellor, p. 595.

The originating notice claimed to fix a fair rent for all the lands comprised in the proposal: the Sub-Commission amended the notice by striking out the 10 acres of Mullaghanard, and fixed the fair rent for Teneille.

Meredith, Q.C., and *Frederick Fleming*, for the appellant:—

The acceptance by the landlord of the tenant's proposal in 1885 created a future tenancy in all the lands comprised in the proposal, and the tenant is not entitled to fix a fair rent in respect of them. There was a surrender of the previous tenancy in Teneille, and a new tenancy created in Teneille *plus* 10 acres of Mullaghanard: these two pieces of land form one holding, "a holding during the continuance of a tenancy means a parcel of land held by a tenant of a landlord for the same term and *under*

(1) 28 L. R. Ir. 326. (2) *Ibid.* 395. (3) 24 L. R. Ir. 2.

the same contract of tenancy." The tenant's rights in respect of Teneille and the 10 acres are identical, and his originating notice should be dismissed, not amended. *Delmege* v. *Mullins* (1) and *Dunphy* v. *Domville* (2) were both cases where the holdings were consolidated and were already in the tenant's possession. Here there was more than such consolidation; there was the incorporation with an old holding of an entirely new take, subject to a new rent; every shilling of that rent issues out of the additional 10 acres. The holding cannot be divided nor the rent apportioned.

The passages in the judgments in *Montgomery* v. *O'Hara* (3) and *M'Donnell* v. *Blake* (4), which lay down that actual visible resumption of possession by the landlord is essential for the determination of a tenancy were unnecessary for the decision of the questions then before the Court. Section 20 is affirmative in form; it does not say that there shall be no determination of a present tenancy without resumption of possession by the landlord; it does not abolish surrender by operation of law: on the contrary, its terms recognise the existence of such surrenders. Naish, L.J., lays down that there is nothing in the Act to prevent the surrender of a present tenancy and the creation of a new one: *Torrens* v. *Cook* (5). *Jackson* v. *Hagan* (6) is a decision by the Irish Land Commission on the question in favour of the respondent; but that case was reviewed in this Court; and this Court, while affirming the order made by the Irish Land Commission, expressed no opinion on the question (7).

Campbell, Q.C., and *Molony*, for the respondent:—

The proposal of the tenant accepted by the landlord in 1885 was by itself inoperative to determine the old tenancy in Teneille and to create a new tenancy. A present tenancy cannot be surrendered or determined without the visible resumption of the possession by the landlord: that is the proper interpretation of section 20 of the Act of 1881: *Montgomery* v. *O'Hara* (3); *M'Donnell* v. *Blake* (4); *Jackson* v. *Hagan* (6); *Laverty* v. *Moore* (8).

The tenancy in Teneille is therefore a still existing tenancy,

(1) Ir. R. 9 C. L. 209.
(2) Cherry, 320.
(3) 24 Ir. L. T. R. 2.
(4) 28 L. R. Ir. 396.
(5) 22 L. R. Ir. 246.
(6) 28 L. R. Ir. 326.
(7) Not reported, 8 Dec., 1891.
(8) 15 Ir. L. T. R. 105.

Appeal. 1893. — CONROY, *Tenant;* DROGHEDA, *Landlord.* — 1894. Feb. 24.

and the Sub-Commission were right in amending the originating notice.

WALKER, C. :—

In this case the landlord has appealed from an order of the Land Commission, dated the 14th July, 1893, which affirmed an order of the Sub-Commission, fixing a fair rent.

It appears that Margaret Conroy was, on the 27th February, 1885, tenant from year to year, and a present tenant, under the Act of 1881, of the lands of Teneille, containing 61A. 1R. 6P. (Ir.), equal to 99A. 1R. 3P. (stat.), the interest in which she had acquired from her husband Thomas Conroy. The rent was £67 10*s.*

Her husband had also been tenant, to the same landlord, of adjoining lands of Mullaghanard, containing 37A. 3R. 35P. (stat.), the interest in which, by some arrangement, passed after his death to his brother Martin Conroy, who was evicted by the landlord, and possession taken up; and on the 27th February, 1885, this farm was, at all events as regards 10 acres (Ir.), in the landlord's hands. The rent of the entire farm of Mullaghanard had been £31 2*s.* 6*d.*

It was not suggested that the landlord ever, in fact, got up possession of Teneille from Mrs. Conroy before or at the date of the agreement next stated. On the 27th February, 1885, Mrs. Conroy signed the following agreement :—

"I, Margaret Conroy, of Teneille, Rosenallis, Queen's County, hereby propose and agree to become tenant to the Most Noble Henry Francis Seymour, Marquis of Drogheda, for my old holding in Teneille, containing sixty-one acres, one rood, and six perches, Irish plantation measure, or thereabouts, together with ten acres, Irish plantation measure, of the lands of Mullaghanard, or thereabouts, as one holding, from the 29th September, 1884 (four) at a yearly rent of seventy-five pounds, sterling, to be paid half-yearly, on every 25th March and 29th September in each year, the first half-yearly payment to be made on the 25th March, 1885 (five); and I also undertake to pay all county cess and other taxes as heretofore."

Mrs. Conroy thenceforth paid the full rent of £75, and received receipts therefor.

Appeal.
1894.

CONROY, *Tenant*; DROGHEDA, *Landlord.*

Walker, C.

On the 29th January, 1892, Mrs. Conroy filed an originating notice to fix a fair rent of all the lands in the agreement, the area being stated to be 113A. 1R. 22P., and the rent £75.

During the progress of the hearing before the Sub-Commission this notice was amended by striking out the portion representing Mullaghanard, and a fair rent of £54 was then fixed for Teneille. The landlord appealed, upon the ground that the tenancy was a future one. No witness was examined on his behalf, and the tenant, Margaret Conroy, deposed that the agreement of the 27th February, 1885, was drawn up in the office of the agent, Mr. Harvey, that she had to sign it when she went with the rent, and that the clerk told her his orders were to take no rent unless she signed the agreement. The clerk read it. She told Mr. Harvey she would sign no lease or binding agreement, as the rent was too high at £75, and he said that had nothing to do with the fixing of the rent; it was only to take the land.

The case derives its importance mainly from the reasons on which Mr. Justice Bewley based his judgment. He says:—

"Prior to the passing of the Land Act of 1881 there would have been a surrender of the old interest in the 61 acres, and the creation of a new tenancy in the enlarged holding. However, having regard to the terms of the 20th section, it now appears to be the law that a tenancy to which the Act applies can only be deemed to be determined whenever the landlord has resumed possession of the holding, and that without the resumption of possession there is no determination of the tenancy, either by notice to quit or by what otherwise would be equivalent to surrender by operation of law. That was decided by us in the case of *Jackson* v. *Hagan* (1). The same principle was laid down by the Court of Appeal in *M'Donnell* v. *Blake* (2), and also in *Montgomery* v. *O'Hara* (3). Under these circumstances we think the old tenancy in this portion of the holding has not been determined."

Neither in *M'Donnell* v. *Blake* (2) nor *Montgomery* v. *O'Hara* (3) had the Court to deal with the implied surrender arising from the taking by the tenant from the landlord of an inconsistent estate; and as the judgment of Mr. Justice Bewley is based mainly upon

(1) 28 L. R. Ir. 326. (2) *Ibid.* 395. (3) 24 Ir. L. T. R. 2.

Appeal. 1894.

CONROY, *Tenant;* DROGHEDA, *Landlord.*

Walker, C.

the language of the Lord Chief Baron, the true explanation of the *ratio decidendi* in *M'Donnell* v. *Blake* (1) will come more appropriately from him.

Can it be that the 20th section has the effect of putting an end, in the case of every tenancy to which the Act applies, to the doctrine of implied surrender, and surrender by operation of law —so important a branch of our real property system? Sect. 7 of the Act of 1860 is an enactment in *pari materia* with that which we are considering, and it distinctly recognises surrender by operation of law as valid:—"The estate or interest of any tenant under any lease or other contract of tenancy shall not be surrendered otherwise than by a deed executed, or note in writing, signed by the tenant or his agent thereto lawfully authorised in writing, or by act and operation of law."

In my opinion the doctrine of implied surrender is not destroyed by the Act of 1881 in tenancies to which that statute applies. There is no express enactment that it is not to be given effect to. On the contrary, I find mentioned in sect. 7 and sect. 20, sub-sect. 1, cases of surrender which would probably be implied surrenders or surrenders by operation of law, and they are only mentioned for the purpose of directing that they are not to injure the position of a tenant who derives his title through them.

Sect. 20 is obscure and ungrammatical as regards the words "or by operation of law," and it is to be observed that it contains affirmative legislation, not negative.

Take the case of a tenant who for the highest consideration applies for and accepts a new lease at half his old rent, is the old tenancy subsisting and unaffected, and has *Lyon* v. *Reed* (2) no application? Such a result might be disastrous to the tenant.

I do not think anything in the 20th section applies to a case where the determination of the tenancy arises from the action of estates *inter se*—the acceptance by the tenant of an inconsistent estate—and constructive possession attributed to the landlord for the purpose of their dealing. Apart, therefore, from the special facts of this case, I think the tenant would fail. I do not consider it necessary to express an opinion on other provisions of the 20th section, on which questions may hereafter arise. In the present case, how-

(1) 28 L. R. Ir. 395. (2) 13 M. & W. 285.

Appeal. 1894.

CONROY, *Tenant;* DROGHEDA, *Landlord.*

Walker, C.

ever, it seems to me impossible to say that there was any surrender of Mrs. Conroy's present tenancy made or intended. Surrender depends on intention. According to her evidence the agent made statements to her which conveyed to her that nothing of the kind was intended on the landlord's part. Then, look at the document itself. The words "my old holding," together with 10 acres added, would convey that her *status* as regards the "old holding" would remain the same as before, and the last words in the agreement, "all county cess and other taxes as heretofore," would be calculated to leave on her mind the impression that there was no disturbance of her *status*. The agent does not contradict her evidence, and I accept it as true. No Court would enforce against this woman a performance of this document in the sense that it would make her a future tenant of all. On the other hand, she had no right to fix a fair rent for both holdings, because I have no doubt she would at best be but a future tenant for the 10 acres added by the agreement of February, 1885.

The originating notice, however, has been amended in the Court below, and finding that amendment made, and the case having proceeded upon it, we shall deal with the case on that footing, and I think her rights in respect of the holding of Teneille must be treated as still subsisting. Mrs. Conroy is liable to Lord Drogheda for the value of her use and occupation of that additional land; but it is to be distinctly understood that our order only affirms her right to fix a fair rent of Teneille, leaving quite free the rights of the landlord as to the 10 acres consequent upon her repudiation of the agreement of the 27th February, 1885, as a whole, and we shall, by our order, guard the rights of the parties in this respect. The appeal will be dismissed, with costs.

PALLES, C.B.:—

It was expressly admitted during the argument of the case, by counsel for the landlord, that the appeal was to be decided upon the supposition that the respondent, Margaret Conroy, was, prior to the 27th February, 1885, the legal tenant of the old holding, in the same manner as she would have been had her husband assigned the tenancy to her in his lifetime, or as if she had been

Appeal 1894.

CONROY. *Tenant;* DROGHEDA, *Landlord.*

Palles, C.B.

duly constituted his personal representative. The decision, therefore, that we are about to make, does not touch such a question as that raised in *Bowman* v. *Catherwood* (1) and cases of that class, as to the *status* of the person entitled to serve an originating notice.

The actual decision of the Land Commission was that the circumstances of the case were such that, had they taken place prior to the passing of the Act of 1881, they would have amounted to a surrender of the old tenancy in the 61-acre farm, and the creation of a new tenancy in the enlarged holding; but that having regard to the 20th section of the Act, a tenancy to which the Act applies can only be deemed to be determined whenever the landlord has resumed possession of the holding, and that, without the resumption of possession, there can be no determination of the tenancy by that which otherwise would be equivalent to a surrender by operation of law. The question which we have to determine is whether that proposition is right in law.

In support of that view the Land Commission referred to *Jackson* v. *Hagan* (2), *Montgomery* v. *O'Hara* (3), and *M'Donnell* v. *Blake* (4). *Jackson* v. *Hagan* (2) was a decision of the Land Commission itself, and it, in fact, decides the proposition reaffirmed by that Court in the present case. The other cases referred to do not directly touch the question. They are relied upon in consequence of some of the judgments therein containing *dicta* which appear to support the proposition. In *Montgomery* v. *O'Hara* (3) the question was as to the right of the tenant to serve a notice under sect. 13, sub-sect. 3, in respect of a tenancy to determine which a notice to quit had been served. Lord Ashbourne there said:—"Sect. 20 is to be read in connection with sect. 13, sub-sect. 3, and it is clear that any tenancy to which the Act applies can only be deemed to be determined when the landlord resumes possession of the holding." These observations are, no doubt, general; but the subsequent words of Lord Ashbourne show, beyond all doubt, that he referred to determination by notice to quit only; for he immediately proceeds to add, "*so that* it is competent for the tenant to exercise the power which

(1) 28 L. R. Ir. 572.
(2) 28 L. R. Ir. 326.
(3) 24 Ir. L. T. R. 2.
(4) 28 L. R. Ir. 395.

the Act gives him at any time after *the notice to quit* has been served, and before possession is taken by the landlord." I do not think that there is any ground for the argument that these words of Lord Ashbourne's can be taken in any sense which would involve the proposition now contended for. The remaining case is *M'Donnell* v. *Blake* (1), a case decided before, though reported after, the decision of the Land Commission in *Jackson* v. *Hagan* (2), and which, although not cited in, may possibly have influenced, and I assume did influence, the decision in the latter case. In reference to *M'Donnell* v. *Blake* (1), I wish at the outset to state that some of the expressions used by me are calculated to be understood in a more general sense than I intended, and that the generality of two sentences of that judgment is such that, in my opinion, they entirely justified the Land Commission in reading them as deciding the very proposition involved in this appeal. I was under the impression, until I read the report during the argument of the present case, that I had carefully guarded myself against expressing an opinion on that question, as it did not arise there; but I find that although I used words of qualification in one sentence, I omitted to do so in two others, and that the two latter may be read as amounting to a decision upon the question. The question which we there considered was whether a tenancy was determined by a notice of surrender served by the tenant, though the landlord had not resumed possession—a question which the Court determined in the negative. My *ratio decidendi* was that sect. 20 of the Act altered the common law mode of determining a tenancy to which the Act applied, and that that section embraced every case of the determination of a tenancy from year to year through the operation of a *notice to quit* or notice of surrender. So far, the words I used accurately expressed my opinion. I, however, added, "In my opinion, although the words actually used are affirmative, 'a tenancy shall be deemed to have determined whenever,' their true meaning includes the negative, 'shall not be deemed to have determined until.'" I shall have a word to say presently in reference to that. I added later on, "The view that resumption of possession by the landlord is essential to any determination of

(1) 28 L. R. Ir. 395. (2) *Ibid.* 326.

Appeal. 1894.

CONROY, *Tenant;* DROGHEDA, *Landlord.*

Palles, C.B.

the tenancy obtains confirmation from the 2nd sub-section of sect. 20." I feel that these general expressions are capable of being understood as applying to any determination whatsoever of the tenancy, instead of being limited to that to which I intended to apply them, viz. every case of the determination of such a tenancy from year to year through the operation of a notice to quit or notice of surrender; and I wish it to be understood that I make these observations in reference to *M'Donnell* v. *Blake* (1), not with the view of endeavouring to excuse myself in any way, but as expressing the opinion that I entertain that the Land Commission were perfectly justified in acting upon those general statements as implying a determination of the question here, and that if there is error in the decision appealed from, that error is mine, and not that of the Land Commission. But what I have said shows that the question did not arise in, and was not decided in, or intended to be decided in, *M'Donnell* v. *Blake* (1). It is one upon which this Court has never expressed an opinion, and which we have now to decide for the first time; and unquestionably it is one of the gravest importance.

I still adhere to the negative construction of this 20th section, to which I referred, but did not make clear, in *M'Donnell* v. *Blake* (3), and which has been misunderstood. I did not intend by that construction to extend the class of events mentioned in the section upon the happening of any of which the tenancy was to determine, but I intended by it to mark the period of time at which the determination of a tenancy within the section should take place. "A tenancy to which this Act applies shall be deemed to have determined *whenever*" a certain event takes place, in my opinion, involves the non-determination at any previous moment of the tenancy in question by reason of the same event; and that in relation to a determination within the section, the words, "a tenancy to which the Act applies shall be deemed to have determined *whenever*," are equivalent to "a tenancy to which the Act applies shall *not* be deemed to have determined *until*." An analogy will illustrate this. A statement with regard to a sale by auction, that "the contract shall be complete whenever the hammer falls," involves that the contract shall not be com-

(1) 28 L. R. Ir. 395.

pleted until that event; but it does not extend the class of contracts you refer to—*i.e.* contracts in relation to sales by auction. It was in that sense I used that negative construction, and used in that sense it can embrace no greater class of tenancies than it would embrace were the construction to be used in the affirmative sense.

I prefer going a little further into the words of this section than the Lord Chancellor has thought it necessary to do. I do not intend to decide any question except the one that is before us; but I find a difficulty in deciding whether a particular case falls within the section or not, unless I am first able to present to my mind, in a clear and intelligible way, the entire scope of the section. We have five events mentioned in the section, upon resuming possession in any one of which the tenancy is to be deemed to be determined. Three of these events are particularly described: two of them are referred to in general terms, but I cannot help thinking that by referring to the three particular events, and ascertaining the necessity for referring to them, we shall gain a great deal of assistance in the construction of the section. The particular events are—(1) the occasion of the purchase of the tenancy by the landlord; (2) default of the tenant in selling; (3) reverter. I will say a few words as to each of these three. Firstly, sect. 1, sub-sect. 3, entitles the landlord to purchase a tenancy upon receiving the prescribed notice of the tenant's intention to sell. Upon the service of notice by the landlord of his intention to exercise the right of pre-emption, the equitable estate in the tenancy passes to him; but, in the absence of further provision, the tenancy would remain undetermined unless there were an actual surrender or assignment of it. Here, then, is one case which might, in the contemplation of the Legislature, call for further provision. Secondly, under sect. 13, sub-sect. 1, where proceedings are taken by the landlord to compel the tenant to quit his holding, the tenant may sell his tenancy at, but not after, certain times specified in the section; but that section does not expressly prescribe the effect which default in selling shall have upon the tenancy in question. There, then, is a second case in which the Legislature might, if it thought fit, make further provision in reference to the continuance or determination of the

Appeal. 1894. CONROY, *Tenant;* DROGHEDA, *Landlord.* Palles, C.B.

tenancy. Thirdly, under section 3, when a tenant dies intestate, and without leaving any person entitled to his personal estate, the tenancy passes to the landlord, subject to the debts and liabilities of the deceased tenant. But, in the absence of any further provision, it might at least be contended that until a personal representative was raised to the tenant, and such personal representative assigned or surrendered to the landlord, the legal tenancy would be outstanding. There, then, is a third case in which the Legislature might, if it thought fit, make further provision in reference to the determination of the tenancy.

Each of these three cases arises, not out of the character or incidents of a tenancy from year to year as it existed before the Act, but by reason of the special incidents annexed by the Act to that class of tenancy from year to year to which the Act applies; and my view of the above three express and particular provisions of sect. 20 is that they refer to the particular cases I have mentioned, and make provision in reference to the determination of the tenancy in each of the three peculiar cases arising out of the incidents for the first time introduced into the tenancy by the Act of 1881. Read thus it enacts that where the landlord exercises his right of pre-emption, the tenancy is not to expire upon the service of the notice which creates an equitable interest in the landlord, nor upon the payment of the purchase-money, but upon the resumption of possession by the landlord. Again, in reference to default in selling, the section enacts that the tenancy shall determine, not upon the expiration of the period mentioned in sect. 13, but when the landlord, in consequence of that, has resumed possession of the holding; and in the same way, that where a state of facts arises that entitles the landlord, upon the death of the tenant intestate, to the interest in the holding, the legal tenancy does not determine *ipso facto* upon the death of the tenant, but when the landlord has resumed possession; but whether it so determines, in the event only of administration to the estate of the tenant having been taken out, or without administration, I express no opinion.

What I have said shows a necessity arising from the provisions of the Act itself, in each of the three cases specifically mentioned in sect. 20, for legislative provision as to the precise time when

the tenancy should be deemed to have determined. Let us now read the section, excluding those three cases, and it will read thus: "A tenancy to which this Act applies shall be deemed to have determined whenever the landlord has resumed possession of the holding . . . . by operation of law or otherwise." Now, the first question I ask myself is—Is there any provision in the Act, in addition to the three which I have already read, which renders necessary some provision by the Legislature as to the determinability of the tenancy?—and I find at once that there is, because the Act provides by sect. 13, sub-sect. 5, that a tenancy from year to year shall not be determined by a notice to quit to enforce which proceedings have not been taken. It is clear that where no proceedings have been taken to enforce the notice to quit the tenancy is not determined by it; but if proceedings are taken to enforce it, the above section does not say to what extent those proceedings shall be prosecuted to operate as a determination of the tenancy, nor does it expressly specify the point of time at which the tenancy shall in that event be deemed to be determined. It leaves it uncertain whether to work a determination, it is necessary that the proceedings shall be prosecuted until the landlord has been put into actual possession, either by the decree of the Court or by the consent of the tenant, and if so whether, when actual possession is taken, the determination of the tenancy relates back to the period mentioned in the notice to quit, or is to be deemed to take place at the time when possession is taken? There, then, is a matter that plainly required legislation, and without which the alterations effected by sect. 13, sub-sect. 3, would be incomplete. Possession taken under a writ of *habere* can in a sense be said to have been acquired by operation of law, and I think it clear that the section includes at least that case. Further, however, I hold, for the reasons stated by me in *M'Donnell* v. *Blake* (1), that those words embrace also every case of possession obtained by reason of the determination of a tenancy from year to year by notice to quit served either by the landlord or the tenant. That construction gives those words, not only some, but large, effective operation. Whether or not there may not be some

(1) 28 L. R. Ir. 395.

Appeal. 1894.

CONROY, *Tenant;* DROGHEDA, *Landlord.*

Palles, C.B.

other cases that would be embraced within the general words, "or otherwise," I do not wish to say; but I think that, by the ordinary rules of construction, they ought to be limited to cases of the same class as those with which they are associated, and which, so far as they are particularly enumerated, are confined to those peculiar rights of landlord and tenant which were created by the Act itself.

Upon the words, therefore, of section 20, I come to the conclusion that the Legislature had not in its contemplation the determination of tenancies by the action of different estates *inter se*, but that it was dealing with the determinability of the new tenancy from year to year by virtue of its own essential character. Previously a mode of determining a tenancy from year to year was the mere service of a notice to quit by either party and the expiration of a certain period thereafter. The statute enacted that, for the future, a tenancy from year to year to which the Act applied should not be determined in that manner, but should be determined upon the landlord resuming possession of the holding, either through the operation of a notice to quit or notice of surrender, or upon a purchase by him under sect. 1, or upon default of the tenant selling, or under his right to reverter in the event of the tenant dying intestate, or in other cases of that description, arising out of the intrinsic character of the tenancy from year to year itself. Now, the doctrine of the common law as to the surrender or merger of estates does not depend upon the peculiar character of the estate itself: it is a general doctrine in reference to all estates, and therefore, in my opinion, is wholly outside the purview of sect. 20, which was not intended to deal with the doctrines of the common law in relation to the effect upon each other of the coalescing of various estates in the same person, but only with the peculiar incidents of the one tenancy dealt with in it. But I have to go a little further, for the purpose of showing that the particular case we have here to deal with cannot be within the section. Could it be contended that if the tenant assigned by deed to the landlord, who was tenant in fee, the tenancy would not have passed? There is nothing in the Act to prevent it passing. If then he re-let to the former tenant, there not having been any change of possession, would that old tenancy remain subsisting

in the landlord as a chattel interest, instead of merging in his immediate freehold as it would have merged but for the Act of 1881? Would it be the immediate reversion on the new tenancy? and if the landlord died intestate would the old tenancy from year to year go to his personal representative, and the tenancy in fee to his heir-at-law? Again, were the tenancy assigned by deed to the landlord who was tenant for life, and if he re-let to the old tenant, there being no change of possession, would the old tenancy subsist in him as a chattel interest, so that the tenancy for life would not be the immediate reversion upon the new tenancy? If it did, what effect would it have upon the application of the ordinary powers of leasing, as well statutory as those ordinarily contained in settlements and wills? These considerations (and many others will occur to any Real Property lawyer) satisfy me that were the construction contended for to prevail, the whole system of Real Property law, the whole doctrine of title to estates would be involved in inextricable confusion.

There is to be added to what I have said the third matter alluded to by the Lord Chancellor on the affirmative evidence upon the face of the Act itself, that it was known to the Legislature what was a surrender by operation of law, that it contemplated the possibility of a surrender by operation of law continuing to exist, and then the absence of words referring to such surrender in sect. 20 is almost conclusive to show that it was not intended that that section should be universal in its operation. Section 7 of the Act of 1860, which is part of this code, enacts "the estate or interest of any tenant under any lease or other contract of tenancy shall not be surrendered otherwise than by a deed executed or note in writing signed by the tenant or his agent . . . or by act and operation of law"; and by the 7th section of the Act of 1881 it is provided that:—"A tenant, on quitting the holding of which he is tenant, shall not be deprived of his right to receive compensation for improvements under the Landlord and Tenant (Ireland) Act, 1870, by reason only of the determination *by surrender* or otherwise of the tenancy subsisting at the time when such improvements were made by such tenant or his predecessors in title, and the acceptance *by him* or them of a new tenancy." That section is not confined to cases before the Act;

Appeal. 1894.

CONROY, *Tenant;* DROGHEDA, *Landlord.*

Palles, C.B.

it includes those since the Act; and, therefore, the Legislature contemplated not only an actual surrender by the tenant to the landlord, but a surrender caused by the acceptance by the tenant of a new tenancy in himself. The first sub-sect. of sect. 20 shows the same idea in the mind of the Legislature in reference to a surrender by operation of law caused by a new tenancy created, not in the tenant himself, but in a third person—"A surrender to the landlord of a tenancy, for the purpose of the acceptance or admission of a tenant, or otherwise by way of transfer to a tenant, shall not be deemed to be a determination of the tenancy."

I think that all these matters show clearly that the Legislature had before their minds in framing sect. 20, with part of which sect. 7 is *in pari materia*, the possibility of the determination of the tenancy by surrender, by reason of the tenant accepting a new estate, and that they did not intend to interfere with that mode of determining a tenancy. So far, therefore, as regards the general question decided by the Land Commission, I am of opinion that, no doubt misled by observations of mine to which I have referred, the decision at which they arrived was erroneous.

So much for the general question. One word now as to the facts of the case. I am clear that, as a matter of fact, there was no surrender. A surrender is caused by the acceptance of a new estate by the tenant, that is, by a new tenancy; and as the relation of landlord and tenant is constituted by contract, before we can decide that there was a new tenancy, we must decide that there was a new contract; and before we can decide that there was a new contract we must decide that the minds of both parties were *ad idem*. It is clear to my mind, as a conclusion of fact from the evidence, that the respondent did not intend to accept a tenancy that was not a "present tenancy"; that she had in her mind—1, the continuance in her of such estate as she theretofore had in the 61 acres; 2, the extension of her then existing estate to the additional 10 acres, and an alteration of the amount of the rent. I think it immaterial whether the landlord, or those acting for him, intended to extinguish the present tenancy, and grant that which alone could by law have been granted as a new tenancy, a tenancy in the entire as one new tenancy, that is a future tenancy. If that were

intended by the landlord, then the minds of the two parties were not *ad idem*, and there was no contract. If, on the other hand, they intended that the estate in the 61 acres should remain as it theretofore was, and an estate identical in its nature should be created in the 10 acres, then the intention of both parties was to effectuate that which the law would not permit, and the ineffectual intention to do so could not extinguish the existing estate in the 61 acres, which *ex hypothesi* was, according to the intention of both parties, to continue to exist. Upon the facts, therefore, I have arrived at the conclusion that there was no surrender in the present case.

I have lately read some observations of Mr. Edge, in the notes upon this section in his book upon Leases (1), and upon the whole, I approve of the mode in which he there treats this question. His view is the same as that at which I have arrived, that it is impossible to hold that there cannot still be a surrender by operation of law, but that the effect of a surrender by operation of law of a present tenancy, by the acceptance of a future tenancy, effects an alteration in the rights of the parties so much more grave than that which formerly would have been involved in the surrender of

(1) Edge, Forms of Leases (2nd ed.), pp. 3 and 4:—"A tenant of a present tenancy is not prohibited from surrendering his tenancy, and entering into a new one, which, when it is created after the 1st of January, 1883, will be a future tenancy; since he has, however, many advantages as a present tenant, which he would not have as a future one, though it may be clear that he is competent to surrender his rights and become a future tenant, any such agreement would certainly be looked on with suspicion, unless the tenant got some advantage proportionate to what he gave up, and might, therefore, be liable to be set aside on the various grounds on which improvident agreements are avoided. A reduction of rent would not probably be considered as a fair equivalent for a surrender of a present tenancy from year to year. . . . In case, then, a landlord and tenant agree to substitute a future for a present tenancy, without calling in aid the supervision of a Court, the consideration for the change should be apparent on the contract, which ought to be in writing, and the intention to surrender the existing tenancy should be expressed in it, and not left to mere inference. . . . The 20th section also states that a present tenancy shall be deemed to have determined 'whenever the landlord has resumed possession of the holding' in certain ways in the section enumerated. Probably the words '*resume possession*' will not be held to mean an actual visible change of possession."

Appeal. 1894.

CONROY, *Tenant*; DROGHEDA, *Landlord.*

Palles, C.B.

an old tenancy by the acceptance of a new one, that we are driven to examine very critically the exact intention of the parties, to see whether both agreed as to the nature of the new estate which the landlord should grant; and thus we are brought into all the old learning in reference to surrender by operation of law, in which the primary consideration was intention.

I agree that the appeal should be dismissed with costs.

FITZGIBBON, L. J.:—

Since 1885, under the belief that a new arrangement had been made by contract, the parties have been acting, in our opinion, under a misunderstanding. The legal effect, subject to any equitable conditions which might be necessary, is to leave Mrs. Conroy tenant under her old tenancy of Teneille, and to render her liable to the landlord in use and occupation for the ten acres of Mullaghanard, which she beneficially occupied upon terms not mutually agreed upon. We consider that she is a "present tenant" of her holding in Teneille, and is therefore entitled to fix a fair rent in respect of it. But as she is in possession of the ten acres of Mullaghanard under a misunderstanding only, we consider that she is merely permissive tenant of this portion of land, and therefore not entitled to fix a fair rent for it; on the contrary, on the misunderstanding being shown, and no new bargain made, the landlord can take up the possession, discharged from any tenancy from year to year. No doubt the tenant served an originating notice apparently affirming the proposal of 1885, and relying on it as giving her the rights of a present tenant in both these parcels of land. But this was met by the landlord's showing that she was never a "present tenant" under that proposal, to which the tenant rejoins that she never intended to surrender her present tenancy in Teneille, and so the absence of any contract is proved. Possibly, as a rule, it might be in the interests of justice for the Court below to dismiss rather than to amend an originating notice that asserts a tenancy that does not exist, leaving the true case to be made in a new proceeding. But this is a question of mere procedure, and I am willing to regard this case as having been dealt with by the Land Commission, and to deal with it here, as one based upon an originating notice which has been so

amended as to deal with the original present tenancy in Teneille only. It is plain from the evidence that the tenant never intended to surrender her "old holding" in Teneille. Her evidence is uncontradicted, and every presumption is in her favour. The document was prepared by the landlord's representative; the tenant had no independent advice. I think the meaning of the whole transaction was to alter the amount of land the tenant had, and to put the two lots, Teneille and the ten acres of Mullaghanard, into one holding, subject to a lump rent, so that, except as to rent, the tenant's rights as to Teneille should remain the same, and the little bit of land in Mullaghanard was to be "thrown in," as it were, with Teneille. If I were not a lawyer, but only a tenant in Mrs. Conroy's position, I should never have understood anything else from the terms of the document. Mrs. Conroy surely never thought she was surrendering her land, or altering her *status*, when she signed an agreement containing the words: "I propose and agree to become tenant of *my old holding* in Teneille *together with* ten acres of Mullaghanard . . . . and I also undertake to pay all county-cess and other taxes *as heretofore.*" I do not like to put the alternative that it was present to the mind of the landlord's representative that Mrs. Conroy's signature would put an end to her present tenancy in Teneille. I do not believe either party thought of altering Mrs. Conroy's statutory rights. It is not possible now to attach those rights to the Mullaghanard holding, and nothing has happened to make it inequitable still to maintain them as to Teneille. Therefore, according to my view, Mrs. Conroy has been in possession of Teneille all along under her old tenancy, and of Mullaghanard under a misunderstanding, and she can fix a fair rent *for* Teneille, but is liable in use and occupation for Mullaghanard.

The case is to be determined under the Common Law, and not on the construction of the Act of 1881, sect. 20. But that section has been so much discussed that I think it right to say a few words upon it. It is one of those provisions found all through the Land Acts which compel us to recognise things which, apart from these enactments, have no legal existence. For instance, we are not unfamiliar with that legal *chimæra*, a tenancy from year to year which we are to deem to be still subsisting, though a

Appeal. 1894.

CONROY, *Tenant;* DROGHEDA, *Landlord.*

Fitz Gibbon, L. J.

notice to quit has been served, and has been followed by a demand of possession; similarly, a tenancy is to be deemed still subsisting for the purposes of the Act, though the lands are under eviction for non-payment of rent. The germ of this style of legislation is to be found in the definition of "tenant" in the Act of 1870, s. 70, which enacts that a man *shall be deemed to be a tenant notwithstanding the determination or expiration of his tenancy*, until the compensation due to him under the Act has been paid or deposited. As at present advised, I think effect may be given to sect. 20 of the Act of 1881, by applying it to these creations of the Legislature, and as providing when they shall come to end. It seems to me that the section means that whenever the landlord has resumed possession there is to be an end of every tenancy legally existing, or hypothetically deemed to exist, to which the Act applies. But the section is affirmative only; it does not say that no tenancy to which the Act applies shall be determined unless or until the possession has been resumed by the landlord. I shrink from a decision which would leave it open to either landlord or tenant, years after a new contract of tenancy had been made and acted on, to turn round upon the other party, and either to claim the rent, or to assert the rights, incident to a surrendered "present tenancy," upon the ground that by neglect, or even by arrangement, the tenant's possession had not been disturbed. It is to be remembered that the resumption of possession for the purpose of reletting would be only a form; and further, that sect. 20 itself, in sub-section 1, mentions surrenders "for the purpose of the acceptance or admission of a tenant, or otherwise by way of transfer," which were rarely accompanied by resumption of the possession by the landlord, and makes them the subject of an express proviso that they shall not "be deemed to be a determination of the tenancy."

Solicitor for the landlord: *R. T. Fitz Gerald.*
Solicitor for the tenant: *C. E. Corcoran.*

G. Y. D.

M'CANN, TENANT; MARQUIS OF DOWNSHIRE, LANDLORD (1).

Appeal.
1894.
June 13, 14.

Land Act, 1881, *s.* 58—*Town-park—Accommodation land*—Onus *of proof—Evidence of increased value.*

In 1855 the landlord, in consideration of M. agreeing to build a house in "the town of Dundrum," agreed to demise to M., as soon as the house was built, the plot whereon it stood, for a term of three lives or ninety-nine years, and also a plot of 7 acres, "as a town-park," to be allotted to M., and to be held with the house at a rent of 30*s.* an acre, for a term of thirty-one years. M. built the house, and thereupon, in January, 1860, the landlord executed to him a lease of the premises in Dundrum, to hold for the term agreed upon; and in June, 1860, the landlord executed a lease demising to M. 7 acres and 35 perches, situated about half-a-mile from Dundrum, for the term and at the rent agreed upon. This latter was an ordinary agricultural lease, and on its expiration M.'s widow, who had succeeded M. as tenant, continued to hold on as tenant from year to year. At the date of the agreement M. did not live in Dundrum, but he subsequently came to reside there, and till his death carried on the business of publican in that place. His widow continued to live in Dundrum, and kept on his business. She served an originating notice to fix a fair rent of the 7 acres. The landlord offered no evidence that the holding bore an increased value as accommodation land, over and above its ordinary letting value as a farm, save a general statement to that effect by his agent:—

Held (reversing the decision of the Land Commission), that the *onus* of proving that the holding bore an increased value as accommodation land, over and above its ordinary letting value as a farm, lay upon the landlord, and that as this *onus* was not discharged, the holding, which was an agricultural holding, was not excepted from the Land Act of 1881.

Archer v. *Caledon* (*ante*, p. 473) explained.

Boyle v. *Foster* (30 L. R. Ir. 623) distinguished.

APPEAL by the tenant against an order of the Irish Land Commission dated 27th February, 1894, declaring the holding to be a town-park, discharging the order of the Sub-Commission, by which a fair rent was fixed, and dismissing the originating notice.

At the hearing before the Sub-Commission the agreement

(1) Before WALKER, C., PORTER, M.R., and FITZ GIBBON and BARRY, L.JJ.

Appeal. 1894. M'CANN, *Tenant*: DOWNSHIRE, *Landlord.*

hereinafter referred to was produced by the landlord, but was inadmissible in evidence as it was not stamped. The lease of the holding was thus the only evidence of the letting before the Court, and it being an ordinary agricultural lease the Sub-Commission fixed a fair rent on the holding.

The case was re-heard by the Land Commission, and the agreement having in the meantime been properly stamped, was received in evidence, and Mr. Justice Bewley made the order appealed from, being of opinion that the holding was a town-park and excepted from the operation of the Land Acts, 1881, and 1887 (1).

It appeared from the evidence that Hugh M'Cann, the late husband of the tenant, entered into an agreement with the Marquis

(1) The decision of the Land Commission with Mr. Justice Bewley's judgment is reported in the *Irish Law Times* Reports, Vol. 28, p. 58. The passages from the learned Judge's judgment quoted by the Judges in the Court of Appeal are cited from the report there given. The reporter is indebted to the kindness of Mr. Justice Bewley for the manuscript of his judgment, which is here printed.

BEWLEY, J.:—

The holding in this case consists of a field, containing seven statute acres, situated in the Co. Down, about half-a-mile from Dundrum Railway station, and is held under a tenancy from year to year, which arose on the expiration of a lease of the 23rd June, 1860, made to the predecessor in title of the present tenant by the then Marquis of Downshire, for a term of thirty-one years. The tenant resides in Dundrum, and the landlord alleges that the holding is a town-park, and is excluded from the operation of the Land Act of 1881. The first question we have to consider is whether Dundrum is a town within the meaning of the Act. In a case from the same locality, heard by us about a year ago, we held Dundrum was not a town, but the recent decision of the Court of Appeal in *Archer* v. *Caledon* (28 Ir. L. T. R. 4) renders it necessary for us to reconsider the matter. Section 15, sub-sect. 1, of the Landlord and Tenant (Ireland) Act, 1870, excluded from certain of the benefits conferred by that Act, *inter alia*, "any holding ordinarily termed town-parks, adjoining or near any city or town, which shall bear an increased value as accommodation land over and above the ordinary letting value of land occupied as a farm, and shall be in the occupation of a person living in such city or town or the suburbs thereof." No definition of a town is contained in this Act, nor in any of the Land Acts, but in numerous cases that came before the County Court Judges, or on appeal before the Judges of Assize, on claims for compensation for disturbance under the Act of 1870, it

of Downshire, of which the following are the material portions:— "It is this 16th day of May, 1855, agreed between the Marquis of Downshire of the one part and Hugh M'Cann of Castlewellan in the County of Down, publican, of the other part, that the said Marquis, as soon as the said Hugh M'Cann shall have . . . completed . . . the dwelling-house . . . hereinafter mentioned, shall and will grant unto the said Hugh M'Cann, his heirs, executors, administrators, and assigns, a good and sufficient lease of all that piece or parcel of ground situated in the town of Dundrum . . . for the lives of their Royal Highnesses Albert Prince of Wales, Prince Arthur William Patrick, and Princess Alice Maud Mary, children of the Queen, and the lives and life of the survivors and

was held that a mere village was not "a town" within the meaning of the Act. Difficulties, of course, arose in determining whether a place was a village or a town, and if it had not Town Commissioners, or was not a town corporate, the amount of the population, the existence of fairs and markets, and the holding of Quarter Sessions or Petty Sessions furnished some tests as to whether it was important enough to be called a town. Newmarket, in the Co. Cork, with a population of 765, was held by Mr. Justice Lawson not to be a town; and Mr. Otway, Q.C., the Recorder of Belfast, considered that Portglenone, Co. Antrim, which had about 800 inhabitants was little more than a village, even though it had fairs. Mr. Justice O'Hagan appears to have been of opinion that Borrisokane, with a population of 700, and Kircubbin, with a population of 600, were not towns within the meaning of the 58th section, sub-sect. 2, of the Land Act, 1881, and judicial rents have no doubt been fixed in hundreds of cases on holdings in the neighbourhood of villages, which would have been held to have been excluded from the operation of the Land Acts, if they had been treated as being near a town. The Court of Appeal seems also to have recognized the distinction between a mere village and a town in the case of *Killeen* v. *Lambert* (10 L. R. Ir. 362), one of the most important cases decided on the question of town-parks under the Land Act of 1881. At p. 366 of the report, Lord Chancellor Law pointed out that in order to exempt holdings as being town-parks from the Act of 1881, three statutory requisites must exist—(*a*), that they adjoin or are near a city or town; (*b*), that they bear an increased value as accommodation land beyond their ordinary letting value for merely farming purposes; and (*c*), that they are occupied by a person living in the city or town or its suburbs. At p. 367, he says:—"The several parcels of land here in question lie, five of them near, and the other two immediately adjoining, if not actually in, the town of Claremorris, in the Co. Mayo, a Quarter Sessions town, with fairs and markets, and containing a population of over 1000." Lord Justice Deasy, at p. 371,

Appeal. 1894.

M'CANN, *Tenant;* DOWNSHIRE, *Landlord.*

survivor of them, and for the term of 99 years, whichever shall longest last, to commence from the 1st day of November, 1854, at the yearly rent of £1 13*s.* 10*d.*, . . . and shall and will also demise or otherwise secure unto the said Hugh M'Cann, his executors, administrators, and assigns, 7 acres statute measure, or thereabouts, of land as a town-park to be allotted by the agent or surveyor of the said Marquis to be held with the said dwelling-house and premises for a term of 31 years, to commence from the 1st day of November next after the said messuage and buildings . . . shall be completely finished as aforesaid at the yearly rent of thirty shillings per statute acre, and one shilling in the £ for receiver's fees."

says:—"Now these holdings are unquestionably near the town of Claremorris, which is a Quarter Sessions town with about 1100 inhabitants, and they are all occupied by persons living in that town." And Fitz Gibbon, L.J., commences his judgment in these terms: "Claremorris is unquestionably 'a town,' not merely 'a collection of houses larger than a village'—Dr. Johnson's definition—but a market and Sessions town, possessing a population and an amount of business likely to create a demand for, and so enhance the value of, any neighbouring land suitable for use as accommodation land." Applying the tests already referred to to Dundrum, we find that in 1881 (which, according to the decision of the Court of Appeal in *Nelson* v. *Headfort* (18 L. R. Ir. 407), is the time we must look to to ascertain whether the holding in this case is a town-park within the meaning of the Land Act of 1881) Dundrum had only a population of 372, and had neither fairs nor markets, nor was it the seat of Quarter Sessions or Petty Sessions. Hence, when the question came before us last year we were of opinion that in 1881 Dundrum was not a considerable enough place to be classed as a town. But the recent decision of the Court of Appeal in *Caledon* v. *Archer* (28 I. L. T. R. 4), appears to lay down that the distinction hitherto taken in cases of this description between "town" and "village" is inadmissible, and that if a demand for accommodation land exists, and such land bears an increased value for accommodation purposes, over and above its ordinary letting value for merely farming purposes, it is immaterial whether the place which it is near would in ordinary language be called a "town" or a "village." The Lord Chancellor says (28 Ir. L. T. R. 4):—"The judgment of Mr. Justice Bewley assumes that this holding has every incident of a town-park, except one. There must be three incidents attached to a holding to constitute it a town-park: First, occupation by a person living in the place, I won't call it a town; secondly, increased value by reason of being near that place; thirdly, that the place is a town, that is, that the place must have the general characteristics answering to what one understands by that term." Then

Hugh M'Cann built the house referred to in the above agreement, and on the 28th January, 1860, the Marquis of Downshire executed to him a lease of the premises "on the west side of the street of Dundrum," where the house was built, subject to the annual rent of £1 13*s.* 10*d.*, and for the term mentioned in the agreement. Throughout this lease, which was an ordinary lease of a dwelling-house, Dundrum is styled "the town of Dundrum." Its contents are otherwise immaterial for the purposes of this report.

Subsequently by a lease dated the 23rd June, 1860, the Marquis of Downshire demised to Hugh M'Cann the holding in respect of which the tenant had served her originating notice, and

he refers to the particular facts of that case, and states: "When we have people requiring the accommodation land, people using that accommodation land, people living in the place for which that accommodation was necessary, and paying 50 per cent. more for their land, on account of being near that place, we have all the essentials of the definition of a town-park."

Then, the Chief Baron, in the course of his judgment, says:—"The whole of the Land Act of 1881 deals with land in its normal character of land, and with the normal value of land as land, and therefore, it excepts out of its general code land of the description I have mentioned. I therefore look on this matter of increased value of land as accommodation land as one of the elements that will enable us to render certain what otherwise would be uncertain, and if we join that to the fact that the person for whom it bears this increased value as accommodation land is a person who is living in that city or town, it will be seen what the elements are which must exist in the town to give to that land its increased value as accommodation land. I think the elements of a town are that it is to be such an assemblage of persons as will, in fact, give such increased value to the surrounding land. The test of the land bearing an increased value as being such accommodation land which, years and years ago, was pointed out in the judgment of FitzGerald, B., in *Christy* v. *Gordon* (13 Ir. L. T. R. 79), is the true test for ascertaining whether lands are town-parks, and I am heartily glad to have any part myself in bringing back this decision to the rule that was laid down by that distinguished judge. I cannot help thinking that this is the clearest and most essential element to be sought for when considering whether any particular lands come within this statutory exception. When it clearly appears that there is a subject-matter that answers the description of town in its ordinary sense—an assemblage of houses—and you find that that assemblage of houses is of such a character that it increases the value of the lands that are near it, because of their being used as accommodation lands, the moment that increased value arises, the land becomes town-

Appeal. 1894. M'CANN, *Tenant;* DOWNSHIRE, *Landlord.*

which formed the subject-matter of this appeal. This lease was in the ordinary printed form of agricultural lease in use on the Downshire estate, and contained a good husbandry covenant with no exceptional covenants or reservations. It did not refer specifically to the former agreement, but it recited that it had been agreed that the lessor should demise the holding to the lessee subject to the rent and covenants therein contained. The term granted by this lease was 31 years, to be computed from the 1st November, 1857, and the rent reserved was £11 2*s*. The land demised by the lease was described thus:—"All that and those that part or parcel of land in the townland of Dundrum containing by survey 7A. 0R. 35P. statute measure, or thereabouts, etc., situate, etc." The lease did not use the term "town-park."

parks within the meaning of sect. 58, and whether, for some other purposes or not, you would call the place a village, the assemblage of houses becomes a town for the purposes of the Act."

Lord Justice Fitz Gibbon also says:—"The question is—are there people, wanting land, and willing to pay more than its mere normal value for it, living in this place called Caledon? If so, it is a town so as to make the land one of the statutory exceptions mentioned in sect. 58."

The test referred to in these judgments we have, of course adopted, and acted on as we were bound to do. But although this test is put forward so prominently in the judgments, I apprehend it is not to be taken as the sole test of what constitutes a town within the meaning of the Land Acts. I take the decision as establishing that, not only must a demand for accommodation land at an increased value exist, but also that "the assemblage of houses," referred to in the judgment of the Lord Chief Baron, must be something reasonably answering the description of a town, and that a mere hamlet, or cluster of houses, is not to be treated as a town for the purposes of the Land Acts. It would be a mistake to suppose that a large number of houses must exist to create a demand for accommodation lands. If there are four houses at a cross-roads—a public-house, a blacksmith's forge, a general shop, and a school—the publican, the blacksmith, the shopkeeper, and the schoolmaster will seek to become tenants of small plots of land near their houses, to keep their cows on, or to provide vegetables for their households, and will undoubtedly give higher rents for such plots for accommodation purposes than the rents that would be paid for these lands for ordinary farming purposes; but it could not, of course, be held that these plots were town-parks within the meaning of the Act.

Although the population of Dundrum, in 1881, was so small that it could not well be considered anything more than a seaside village, we are of opinion,

Hugh M'Cann, the lessee, died in 1886. He had previous to his death for several years resided and carried on the business of publican in Dundrum, but he did not carry on business or reside in Dundrum until after he had acquired possession of the two parcels of land mentioned in the agreement of 1855. On his death his widow, the appellant, succeeded him as the tenant, and lived in Dundrum.

The seven acres comprised in the lease of June, 1860, were all contained in a single field situated about half-a-mile from Dundrum on a "loaning."

This field had always, since the date of the lease, been tilled as an ordinary farm. The Poor Law Valuation was £8 15*s.*; Mr. Murray, land valuer, examined on behalf of the tenant,

on the evidence, that there was then, and is now, a demand for accommodation land by the inhabitants at an enhanced rent, and that applying the test laid down in *Earl of Caledon* v. *Archer* we must deem it to be a town for the purposes of the Land Acts. In addition to its normal or census population, it has probably a summer population of visitors, who come there for sea-bathing or sea air, whose presence, no doubt, substantially increases the consumption of milk and vegetables, and consequently stimulates the demand for town-parks.

In the present case an agreement was entered into on the 16th May, 1855, between the Marquis of Downshire and the husband of the present tenant, by which the Marquis agreed to let to him a plot of ground in Dundrum, for building purposes, for a term of three lives, or ninety-nine years, at a rent therein mentioned, and to allot to him a "town park" in the vicinity, to be held for a term of thirty-one years, at a stipulated rent. The building lease executed in pursuance of this agreement bore date the 28th January, 1860, and the lease of the plot designated "town-park" in the agreement was executed on the 23rd June, 1860.

The land constituting the holding is near Dundrum, and according to the evidence bears an increased value as accommodation land over and above the ordinary letting value of land occupied as a farm, and at the date of the passing of the Land Act of 1881 it was in the occupation of a tenant living in Dundrum. The three statutory requisites necessary to constitute it a town-park within the meaning of the 58th section of the act therefore exist. The tenant has sought to bring himself within the saving clause contained in the 9th section of the Land Act of 1887, but, in our opinion, he has failed to establish that the holding was let and used as an ordinary agricultural farm. The order of the Sub-Commission, fixing a rent, must be discharged, and the originating notice dismissed.

Appeal. 1894.

M'CANN, *Tenant;* DOWNSHIRE, *Landlord.*

proved that the fair rent of the holding would be £6 1*s.* 6*d.*, and he stated that he put on 10 per cent. of this rent for proximity to Dundrum.

The report of the Sub-Commission stated that the entire 7 acres and 35 perches were second-class tillage lands, that they were used as a tillage farm, that the tenant had the soil in good condition; that the nearest market was in Castlewellan, 5 miles off; the nearest railway station at Dundrum, half-a-mile off; and that the lands were situated some distance off the county roads. The report also stated that 10 per cent. had been added to the fair rent for proximity to Dundrum. The Sub-Commission fixed the rent at £9 10*s.*

The Court valuers reported that the fair rent should be £9 10*s.* They reported that the holding had been suitably used, and except that they put down 15 per cent as the amount added for proximity to Dundrum their report agreed with that of the Sub-Commission.

It appeared that in 1881 the population of Dundrum was only 372, and that in 1891 it had risen to 474. Dundrum has neither fairs, nor markets, nor is it the seat of Quarter Sessions or Petty Sessions. It has a wharf, to which the Downshire Steam Navigation Company's steamers brought coals, and from which they shipped cattle.

In the re-hearing before the Land Commission the following evidence was given by the landlord's agent on the direct examination:—83. "Do you know whether lands adjoining Dundrum bear an increased value as accommodation for people living in the town?" "I do." 84. "Do they?" "Yes." 85. "Would this holding bear an increased value as accommodation for persons living in the town if it was in your hands?" "Yes." 86. "And you could let it as accommodation?" "Yes; I am asked for land every time I go to Dundrum." 87. "You are continually asked for accommodation land by people living in the town?" "Continually asked for it, and pressed to give it." 88. "Is that for accommodation purposes and grazing purposes?" "Yes." In cross examination—95. "Would you tell the Court, if you please, what quantity of land you have at the present time in your hands in or about Dundrum which is capable of being let as accommodation land?" "We have 20 or 30 acres still in our hands available

for anything we like." 96. "And you are unable to get that let?" "Oh!" 97. "Did you not swear that repeatedly you had demands for accommodation land?" "I did." 98. "Is there anything to prevent you letting portions of these 20 or 30 acres?" "Not a single thing; but we do not choose to do it."

[The case of *Savage* v. *Downshire* (*Marquis of*) was argued on the same day. Its facts were substantially the same as those of the case above reported.]

Healy and *Whitaker*, for the appellant:—

1. This holding is not a town-park—(*a*) because Dundrum is not a "town": *Archer* v. *Caledon* (1) is an express authority that "the assemblage of houses" which will make an adjoining holding a town-park, must possess the characteristics of a town. Dundrum is only a village: it has no fairs, markets, petty sessions, or quarter sessions; (*b*) because no evidence has been given by the landlord, on whom the *onus* rests, that this land "bears an increased value as accommodation land over and above the ordinary letting value of land occupied as a farm."

2. If this holding is a town-park it comes within section 9 of the Land Act of 1887. It has been "let and used as an ordinary agricultural farm." The user is proved by the reports of the Sub-Commission and Court valuers. The lease of June, 1860, is an agricultural letting. It is a simple agricultural lease.

The plot in Dundrum, and the land demised by the lease of June, 1860, are different holdings. The cases cited by the respondent's counsel were all cases where there was only one holding demised, and it was held to be outside the Act, by reason of the predominant portion of it being non-agricultural, and non-pastoral.

The Right Hon. J. Atkinson, Q.C., and *Meredith, Q.C.* (with them *Hume*), for the respondent:—

1. This is a non-agricultural and non-pastoral holding. The agreement of 1855 shows that the two plots were let to be used together as one take: the town-plot overshadows the rest, and

(1) *Ante*, p. 473.

Appeal. 1894. M'CANN, *Tenant;* DOWNSHIRE, *Landlord.*

puts it outside the Land Act: *Boyle* v. *Foster* (1); *Bradley* v. *Johnston* (2); *Crookshank* v. *Law* (3).

2. This holding is a town-park: it is so described in the agreement of 1855: it is used merely as an adjunct to the holding in the town, and for the accommodation of the tenant who lives in the town. That Dundrum may fairly be described as a town is plain from the agreement of 1855, and the lease of January, 1860. Population is not the test: *Archer* v. *Caledon* (4). That the holding bears an increased value as accommodation land over and above its ordinary letting value is plain from the rent that was paid for it during the currency and since the expiration of the lease: the tenant's valuer even adds 10 per cent. to the rent, owing to the vicinity of Dundrum, and the landlord's agent proves the demand for accommodation land: *Archer* v. *Caledon* (4). The Land Commission do not allow the value of land to be proved by reference to the rents paid for adjoining holdings.

Cur. adv. vult.

June 14.

WALKER, C.:—

The holding in this case contains 7A. 0R. 35P. The rent is £11 2*s.*, and the valuation £8 15*s.*

Mr. Justice Bewley decided against the tenant, on the ground that the holding was a town-park. This involved that the holding bore an increased value as accommodation land over its ordinary letting value as a farm. As I dissent on that point from the view of Mr. Justice Bewley that might be sufficient for my judgment. But inasmuch as on another point in the case he founds his judgment on a view he took of the decision of this Court in *Archer* v. *Caledon* (4), I think it necessary to call attention to our decision, and the view (as reported, 28 Ir. L. T. R. 58), which he took of that decison. He says:—"But the recent decision of the Court of Appeal in *Archer* v. *Caledon* (4) laid down that the distinction hitherto taken between town and village was inadmissible, and that if the demand for accommodation land existed, and such land bore an increased value for accommodation over and

(1) 30 L. R. Ir. 623.
(2) *Ibid.* 632.
(3) 27 Ir. L. T. R. 2.
(4) *Ante*, p. 473.

above its ordinary letting value, it was immaterial whether the town was called in ordinary language a town or village." So far as I am concerned, I took special pains to state that there must exist in every case that which has the characteristics of a town. There is no definition of a town, and therefore its existence must be gathered in each case from the facts into which population must enter, but no arbitrary number of inhabitants. I said:—"No doubt we must have something that will present generally the characteristics of a town. But when we have people living in a town and requiring and using accommodation land, and paying 50 per cent. more for their land on account of its being near that place, and those people constitute such an assemblage of persons as is sufficient to create that increased value, and there is an assemblage of houses presenting generally the characteristics of a town, I think all the essential definitions of town-parks exist."

Before us two questions were argued:—1, that the holding was not agricultural or pastoral, but residential; and it was presented in this way:—The agreement of the 16th May, 1855, provides for a letting of the site for a house to be built, and also for a separate letting of 7 acres of land as a town-park to be held with the house, and therefore that the house and the land (which was the adjunct) are grouped together, and the element of house overshadows the attached element of land. But this argument ignores the definition of "holding" given in the Act, which is as follows:—"'Holding' during the continuance of a tenancy means a parcel of land held by a tenant of a landlord for the same term and under the same contract of tenancy, and, upon the determination of such tenancy, means the same parcel of land discharged from the tenancy." Again, "'tenant' means a person occupying land under a contract of tenancy." But the holding of 7 acres does not spring by contract out of the agreement of 1855. That agreement could not be specifically performed. It is the lease of June, 1860, which made this piece of land a "holding." The house in Dundrum and the land outside Dundrum are held for terms widely different. If there was a contract to work a mill upon a piece of land, and also by the same contract it was agreed that a piece of agricultural land in addition should be demised to the tenant to be held as an adjunct to the mill, and if the letting of

Appeal. 1894.

M'CANN, *Tenant;* DOWNSHIRE, *Landlord.*

Walker, C.

this additional piece of land was carried out by a different lease, for a different term, and creating a wholly different relation of landlord and tenant from those existing in the case of the mill, would that letting become a mill and fall outside the Acts? *Boyle* v. *Foster* (1) affords no authority for such a proposition. In that case and in all others where any such question arose there was but one holding and one contract of tenancy; and if the tenant was ruled outside the Act, it was because the predominant part of his one holding was non-agricultural or non-pastoral.

The second question argued before us was, Is this holding a town-park? I agree that the agreement of 1855 carries the landlord a considerable way. It adopts the terms "Town" and "Town-park." It is a printed agreement. But, of course, all town-parks are not excluded from the Act of 1881. The town-parks excluded are those which have certain incidents:—1, they must be in the occupation of a person living in a city or town; 2, they must bear an "increased value as accommodation land over and above the ordinary letting value of land occupied as a farm." The origin of the tenancy is of importance, and it is repugnant to the idea of accommodation land. There was evidently a desire to encourage building in Dundrum, and, as an aid, to give a piece of land when the house was built. The landlord fixes the rent of land, and is master of the position. It is very unlike the case of a townsman, located in a town, competing for a bit of land for the accommodation of his dwelling and giving an enhanced price accordingly. But the case is wholly wanting in evidence that there was an increased value as accommodation land. There is nothing to show that 30*s.* an acre was more than the ordinary rent of an ordinary farm. There is no evidence that other persons held accommodation land, or that this or any other plot was ever in the hands of townsmen having and requiring accommodation. On the contrary the landlord had 20 or 30 acres idle on his hands, which he did not wish to let, so that it would appear that the supply exceeded the demand. The evidence of the agent, given generally in answer to leading questions, was wholly insufficient to discharge the *onus* cast on the landlord. Accommo-

(1) 30 L. R. Ir. 623.

dation is a term of large import. It is said that there is 10 per cent. value for proximity, and that this must be accommodation value. I wholly deny that. No doubt there can be no accommodation value without including proximity, but the converse is not true. In some cases the figures of rent and value may be almost conclusive evidence that the land bears accommodation value. So the 50 per cent. in the *Caledon Case* (1) might go far towards that result. The existence of the railway station and the wharf is an ample basis for the proximity value of 10 per cent. The valuation of this holding is £8 15*s.*, and the yearly rent is £11 2*s.* on an acreage of 7 acres and 35 perches. The rent and the valuation by no means stand out in startling contrast, and they wholly fail *per se* to suggest competitive value. They suggest that the rent of the land may be something higher by reason of being near a station and port of export. There is no evidence of the existence of any class of townsmen who had ever got land for accommodation or who wanted it now. Therefore I think the *onus* was not satisfied.

Savage's Case which was argued after *M'Cann's Case* seems to me to present features which are all common to *M'Cann's Case*. The Sub-Commission having the agreement of 2nd January, 1855, before them held that the holding was not agricultural or pastoral. The decision of the Chief Commission was based upon a different ground, namely, that it was a town-park. I have already in *M'Cann's Case* given my reasons for holding that this view taken by the Sub-Commission cannot be sustained. It follows that *Savage's Case* stands on the same footing as *M'Cann's Case*.

The order of the Land Commission in both must be discharged, and also that of the Sub-Commission in *Savage's Case*, and the cases remitted to be dealt with as justice shall require. The tenant in each case must have his costs here, and before the Chief Commission.

PORTER, M.R.:—

I am of the same opinion, and I should add nothing, except that we are differing from the decision of the Land Commission, who held, reversing the decision of the Sub-Commission, that M'Cann

(1) *Ante*, p. 473.

Appeal. 1894.

M'CANN, *Tenant:* DOWNSHIRE, *Landlord.*

Porter, M.R.

was not entitled to have a fair rent fixed, on the ground that the holding was a town-park within the meaning of the Act. It is right, therefore, that I should state in my own words my reason for coming to the conclusion at which I have arrived.

In *Savage's Case* the Sub-Commission refused to fix a fair rent, the agreement being before them in that case, while owing to a defect in its stamping the agreement was not admitted in evidence in *M'Cann's Case*. Probably if the agreement had been made evidence in the latter case before the Sub-Commission their decision would have been different. We have got the whole case now before us and we have to determine whether any of the contentions presented on the part of the landlord have been sustained.

The decision of the Land Commission in both cases proceeds upon the ground that the holdings were town-parks. That is not the ground which was mainly argued before us. I will deal first with *M'Cann's Case*. It was mainly pressed upon us that this holding was neither agricultural nor pastoral, and so not within the Act at all. The argument upon this point was not based upon the mode of user or the character of the letting of the particular holding taken by itself. It could not be so based, having regard to the lease of June, 1860, and to the fact that the seven acres were used and cultivated as an ordinary farm. But it was contended that in view of the agreement of 1855, M'Cann's holding of seven acres was to be treated as an adjunct to his town holding, and that for the purposes of the Land Act it must be dealt with as if M'Cann had but one holding; and that inasmuch as a large portion of that one holding consisted of a town letting admittedly outside the Act, the entire subject-matter must be excluded as not being an agricultural or pastoral holding within the meaning of the Act. The only cases upon this branch of the argument which were relied on were the familiar ones of residential holdings, and mill holdings. In each of these, however, where it was held that the holding was not agricultural or pastoral within the meaning of the Act, the holding was one, the take was one, the contract of tenancy was one; and the reason of the decision was that where a large or substantial portion of the holding was not agricultural or pastoral the entire holding was not agricultural or pastoral within the meaning of the Act. But none of these cases appears to me to have the

Appeal. 1894. M'CANN, *Tenant;* DOWNSHIRE, *Landlord.* Porter, M.R.

smallest bearing upon that which is before us, because though the motive on the part of Lord Downshire in granting the lease of 1860, and of the tenant in accepting it, was the contract to give and accept along with the demise of a house and buildings in Dundrum these previously unascertained seven acres at a rent of thirty shillings an acre, yet the moment the seal was put to the lease of 1860 it became the lease of a separate holding, held by a different contract of tenancy, and legally unconnected with the holding in Dundrum. The formal demise of the town holding was carried out by a totally different instrument, of a different date, and for a widely different term. The cases that have been cited are no authority for the proposition that M'Cann is to be deprived of his right to fix a fair rent of these seven acres by reason of his having under a different contract a separate holding which is neither agricultural nor pastoral.

The Land Commission decided the case upon the ground that these seven acres were a "town-park" within the meaning of the 58th section, and this view must be also dealt with. The agreement of 1855, which led to the leases of 1860, describes Dundrum as a "town," and the holding subsequently to be demised outside the town as a "town-park." The lease of June, 1860, does not so emphatically use these expressions, but I do not think that affects the question. By contract or arrangement between the parties—so far as that can affect the matter—Dundrum has been regarded as a "town," and the holding in its vicinity as a "town-park." Therefore, if the question were whether, apart from the Land Act, this was a "town-park," I think the decision of the Land Commission was right, and there is abundant material for supporting it. That, however, is not the question, because the Act of 1881 does not apply to every town-park. Passing by the thorny question as to what the definition of a town is, and assuming for the purposes of this case, and as between the parties to the agreement of 1855, that Dundrum is to be treated as a "town," assuming that this land, by the agreement of the parties, is to be deemed a "town-park," the question still remains whether it is such a town-park as is excluded from the operation of the Land Acts. That question depends on the terms of the 58th section of the Act of 1881, which excludes, not every town-park, but "any

Appeal. 1894. M'CANN, *Tenant;* DOWNSHIRE, *Landlord.* Porter, M.R.

holding ordinarily termed 'town-parks,' adjoining or near to any city or town which bears an increased value as accommodation land over and above the ordinary letting value of land occupied as a farm, and is in the occupation of a person living in such city or town, or the suburbs thereof." Now, I may pass over the last words of this definition as unimportant for the present case, only remarking that they emphasize the view that it was not intended to exclude from the Act every thing known as "town-parks." The important point in reference to the present case is whether it has been shown that this holding bears an increased value "as accommodation land over and above the ordinary letting value of land occupied as a farm." In my opinion there was no real evidence in the case to sustain such a conclusion. No doubt there were general answers to leading questions which were put to Mr. Howe, the landlord's agent, as to whether or not there was a demand for accommodation land near Dundrum, and soforth. But the question which we have to determine is, does this holding bear an increased value as accommodation land *over and above its ordinary letting value as a farm.* Now, in considering what would be the ordinary letting value of land such as this is, to be used as a farm, the meaning of course must be the letting value of similar land in the actual position and situation in which this land is: that is, land with the necessary advantage of its proximity to a town, if there be a town, to a market, if there be a market. It is not the question whether it bears additional value over and above what it would bear in a situation miles away from the town; but whether, being in actual propinquity to the town, it bears as accommodation land to be used for the benefit of people living in the town a value greater than an ordinary farm in the same position, not occupied as accommodation land. That is, whether persons living in the town would, by reason of their town residence be willing to give a larger rent than, say, a farmer immediately adjoining the holding, but not residing in the town, and not desiring to use it as accommodation land in connexion with a town holding. There is no evidence that such a circumstance exists in this case. No question was put as to what farmers living outside Dundrum would be willing to give for this piece of land separately, or as an addition to their other holdings, if any. That is an essential element,

which must be proved, or arrived at as a natural inference from some trustworthy and sufficient evidence, before the benefit of the Land Act can be withheld from a person who would be otherwise entitled to it. I am therefore of opinion that there has been a defect of proof in the case; and that defect of proof is not supplied by the rent of 30*s.* an acre, fixed in 1855, a rent which does not at all startle me by its amount.

I am of opinion, therefore, that the decision of the Land Commission was wrong in *M'Cann's Case*. Exactly the same considerations apply to *Savage's Case*, which only differs in this, that the rent under the old agreement was left to be settled subsequently, instead of being fixed by the original arrangement at 30*s.* an acre; and the rate at which it was so settled by agreement is not very different from, though somewhat below, the rate at which M'Cann's rent was fixed beforehand.

FITZ GIBBON, L.J.:—

I concur with the Master of the Rolls and the Lord Chancellor, but I am under a special obligation to state my reasons, having been one of the Judges who decided the *Caledon Case* (1). Though Mr. Justice Bewley has not quoted any passage from my judgment, I was a party to the decision, and I fully concurred in it. I hope that it will now be clearly understood, from every judgment delivered here, that this case is decided by this Court upon the clear, single, and complete ground that the *onus* rests upon the landlord, in every case of "town-parks," of giving evidence that the particular holding "bears an increased value as accommodation land over and above the ordinary letting value of land occupied as a farm," and that no tangible or sufficient evidence has been given to discharge that *onus*, and therefore that the holding, which *ex hypothesi* is agricultural or pastoral, is not brought within the exception, and remains within the Act. But though that is the sole ground of our decision, it is impossible, in justice to the Land Commission or to ourselves, to part with the case without referring to the arguments which appear to have been deduced from *Archer* v. *Caledon* (1). It is only right to say that the report of

(1) *Ante*, p. 473.

Appeal. 1894. M'CANN, *Tenant;* DOWNSHIRE, *Landlord.* Fitz Gibbon, L. J.

Mr. Justice Bewley's judgment, as it stands in the *Irish Law Times*, must be either inaccurate or incomplete, for it contradicts itself. The learned Judge is reported as first stating that in the earlier cases it was held that a mere village was not a town, "the number of the population, the existence of fairs and markets, and the holding of quarter and petty sessions, being *some of the tests* as to whether it was important enough to be called a town." Such has been the uniform course of decision in this Court. He then mentions cases decided by individual Judges in which the population test seems to have been treated as decisive. He refers to Newmarket, with a population of 765; Portglenone, with a population of 800; Borrisokane, with a population of 700; and Carrickallen, with a population of 600, which were held not to be towns. He does not mention Carlingford, with a population of 727, which was held by this Court to be a town. He then says that "the Court of Appeal *seemed* to have recognized a distinction between a mere village and a town in *Killeen* v. *Lambert* (1)." If he thought that this Court ever ignored that distinction, or deviated from the principle of applying all the enumerated tests to determine the question, I must respectfully differ from him. We then come to this passage—"But the recent decision of the Court of Appeal in *Archer* v. *Caledon* (2), laid down that the distinction hitherto taken between town and village was *inadmissible*, and that if the demand for accommodation land existed, and such land bore an increased value for accommodation land over and above its ordinary letting value, it was *immaterial* whether the town was called in ordinary language a town or village." There is no judgment, no passage in any judgment, in *Archer* v. *Caledon* (2), that even suggests that the distinction between a town and a village, as known to "ordinary language," was either "inadmissible" or "immaterial." On the contrary, every judgment in that case assumes that Caledon had all the ordinary characteristics of "a town." If Mr. Justice Bewley used this language, he can only have done so in an unguarded manner, but I doubt that he did so, for immediately afterwards he quotes from the Lord Chancellor—"the place must have the

(1) 10 L. R. Ir. 366. (2) *Ante*, p. 473.

general characteristics of a town"—and he states the effect of the decision in the following words, which appear to be perfectly right, and consistent with the earlier part of his own judgment, though they are directly contradictory of the passage which I have last quoted. "The decision established that *not only* must a demand for accommodation land exist, *but the assemblage of houses must be something reasonably answering the description of a town*, and that a mere hamlet or collection of houses was not to be treated as a town for the purposes of the Land Acts."

I do not know how these two passages have got into the same report; but they are there, and the second correctly interprets our decision in *Archer* v. *Caledon* (1), while the first entirely misapprehends it.

Now, turning to the question—What is "a town"?—the expression "assemblage of houses," so often used in this Court—first in *Killeen* v. *Lambert* (2)—was taken from Johnson's Dictionary, where the definition of a town is "an assemblage of houses *larger than a village*." The same authority defines a village as "an assemblage of houses smaller than a town." Which term applies to any given "assemblage of houses" is, therefore, a simple question of fact—of more or less—which must be decided on due consideration of all the tests applicable to the particular case.

As to the population test taken alone, it would not in the least surprise me to find that, whether in the popular sense or for the purposes of the Land Acts, one place with a comparatively small population was "a town," while another with a larger population was "a village." The Census depends on boundaries. The urban character may depend on a great number of circumstances, just as the demand for accommodation land depends on many considerations other than mere population. One "place" (and I use that word advisedly, not to beg the question) may be in an agricultural district, inhabited chiefly or largely by farmers, living in contiguous houses for convenience sake, as is often the case on the Continent. They may have ample land for their accommodation, the houses may be somewhat scattered, or may be so situated with

(1) *Ante*, p. 473. (2) 10 L. R. Ir. 362.

Appeal. 1894. M'CANN, *Tenant*; DOWNSHIRE, *Landlord.* Fitz Gibbon, L. J.

regard to agricultural land, that there is no competitive demand for accommodation land. There may be but few shops in the place, and the agricultural residents may be the chief or only customers; there may, in fact, be but very few urban people—townsmen—in the place, and under such circumstances there may be no increase in the value of the land surrounding the place for accommodation land, or it may be restricted to a very small area indeed, though the population may be considerable. Such a place would be rather a village than a town, in ordinary language, and even if it were "a town," the conditions which exclude "town parks" from the Land Acts would not exist, or would attach only to a few special fields or plots. But you may have a smaller number of people, of a different class, living in a place which will have all the characteristics of a town, and where accommodation land will bear a high value. I could hardly take a better instance than Carlingford, where the population in 1881 was only 727, less than in several places which individual judges, acting on the population test alone, held not to be towns. An ancient borough, a port, with fairs and markets bringing concourses of people and cattle, and an urban population—at one time, I think, a walled town, and certainly a town of historic interest and importance—Carlingford was proved to have an urban population, who needed accommodation land, and certain land round the place, including the holding which came before this Court—fields convenient and suitable for use as "town-parks"—was proved to be enhanced in price by the competition of the townspeople. Why were we to deny to Carlingford its ordinary denomination of "a town," and, on the Census alone, to hold that land bearing every statutory characteristic of "town-parks" was within the Land Acts, though the inhabitants were sufficient in number to give increased competitive value to the neighbouring accommodation land, and though the holding before the Court was let and used as such?

The circumstances react, as evidence, one upon another. The enhancement of value shows that the demand is considerable, and the supply limited; and, on the other hand, the number and urban character of the inhabitants show that the enhancement of value is more than mere "proximity value." These are the con-

siderations which, in a very early case, *Christy* v. *Gordon* (1), influenced Baron FitzGerald, whose decision has ever since been quoted with approval in these town-park cases, and his *ratio decidendi* shows that population is only one test, and not even the leading one.

As to the use of "ordinary language," we may legitimately refer even to "the man in the street," and more so to an author writing on the subject. In this view I refer to Lewis' Topographical Dictionary of Ireland, and find a remarkable concurrence with our use of the word "town," of which we were not aware when we decided the *Caledon Case* (2). Caledon is described as a market and post-town, and we are told that "this town, which is situated on the river Blackwater, and on the road from Armagh to Omagh, was, before 1816, a mean village, but is now, through the exertions of the Earl of Caledon, *one of the best-built towns* in the North of Ireland. It contains 226 houses, nearly all of which are built of stone."

The same writer describes Dundrum as "a maritime *village*" and he says . . . "The village which previously consisted of one narrow street, containing only a few houses very indifferently built, has been recently much improved by the Marquis of Downshire, who has widened the old street, and opened several new lines of road, and has promoted the erection of many new and comfortable dwelling-houses." These descriptions afford a curious and suggestive illustration of the relative appropriateness of the words "village" and "town," in ordinary language, to Caledon and to Dundrum.

I now come to the question of evidence of increased accommodation value. I was surprised to hear it suggested that there is or ever was any doubt or difficulty about the admissibility of evidence as to the letting value of surrounding or neighbouring land, in determining whether any particular holding bears additional value as accommodation land. We have had case after case in which evidence of that kind had been given without objection before the Land Commission, and was made the basis of decision in this Court. The *Ballinahinch Case* (3) was a remarkable instance.

(1) 13 Ir. L. T. R. 79. (2) *Ante*, p. 473. (3) Not reported.

Appeal. 1894. M'CANN, *Tenant*; DOWNSHIRE, *Landlord.* Fitz Gibbon, L. J.

There it was proved that land within a certain zone round Ballinahinch was let at three guineas an acre for "town-parks," and town-park tenants got certain allowances, but that the price of ordinary land, not included within that ambit, was only one pound five shillings per acre. The tenant was a shopkeeper who wanted accommodation land, and who had been promised the first vacant piece. He took the holding in question at three guineas per acre, with the town-park allowances, and we held that it was a "town-park." We compared it with the neighbouring holdings, and contrasted it with the ordinary agricultural lettings in the vicinity, and finding that it bore the increased value proved to be paid for other town-parks, we held it to be excepted from the Land Act.

In the earliest and leading case on town-parks, *Killeen* v. *Lambert* (1), it will be seen, on the face of the judgments in this Court, that one of the holdings in question was let at a low rent, but it was nevertheless excluded, because it is a question of "increased value," and not of rent, and this increased value was proved to attach to that holding, by the fact that a similar field on the opposite side of the road had been taken by a butcher in the town at a rent higher than its ordinary value as land.

In the *Caledon Case* (2) the Sub-Commission reported that 50 per cent. of the value of the holding was what they called "proximity value"; and, according to my recollection, the official valuer also added 33 per cent. for "proximity value." How such an enhancement as 50 or even 33 per cent. could arise from the mere increase in the value of the land, as a productive agent, by reason of its proximity to such a town as Caledon I could not see. There must have been something else to raise the value. We found it proved, as matter of fact, that in Caledon there were markets and fairs, and a number of shopkeepers who wanted land for the accommodation of themselves and their customers, for the stock brought to the markets, and for the establishments in the town, and it was proved that this competitive demand actually raised the value of certain fields round the town, including the holding in question. Such en-

(1) 10 L. R. Ir. 362. (2) *Ante*, p. 473.

hancement is not merely "proximity value." It is the value which must be proved to exclude a "town-park" from the Land Act, namely, "increased value *as accommodation land* over and above the ordinary letting value of the holding occupied as a farm." The Master of the Rolls, I venture to say, has hit the very point, when he distinguishes this excluding value from proximity value, and says that the latter necessarily attaches to the land in the place in which it is, no matter who occupies it. A farm is not ambulatory. If it is not out in the country, but is near a town, it has "proximity value," and its "ordinary letting value occupied as a farm" includes its "proximity value."

No doubt, the valuers seem to calculate this value by first estimating what the land would be worth if it was in the country, and then adding a percentage for proximity; but this is only a system of valuation, and we must not confound the proximity value which essentially belongs to a holding, no matter in whose hands it may be, with the further enhancement, caused by the fact that there is only a limited supply of such land, and that there is a demand for it by neighbouring townspeople who want it for their accommodation. This latter value must be proved by the landlord. In this particular case I am able to refer to the clear language used by Mr. Justice Bewley, in describing the cause of the increase of the value of this holding, as aptly illustrating the distinction which I draw, and as accounting for the 10 per cent. enhancement in this case, in a way which negatives "accommodation value." He says:—"Dundrum had a summer population; visitors came for bathing; their presence created a substantial increase in the consumption of milk and butter and vegetables; and the land bore an increased letting value over and above the ordinary value of land occupied as an ordinary agricultural farm." I cannot more clearly describe what, in my judgment, is not additional accommodation value, but is mere proximity value. The visitors do not want accommodation land, but the farmers find customers for their agricultural products among the visitors, and consequently the value of the land is raised by "proximity" to a market for its produce, as distinguished from being raised by the demand of townsmen who want the land itself for their own accommodation. Proximity value attaches to land by reason of its position and

Appeal. 1894.

M'CANN, *Tenant;* DOWNSHIRE, *Landlord.*

Fitz Gibbon, L. J.

quality—being near a market, or near supplies of manure, labour, or the like—and attaches to it as a productive agent in a farmer's hands, as distinguished from the increased value due to competition amongst townspeople who want the land itself for a special purpose.

It is necessary, *toties quoties*, to make the reservation that we determine this case upon its own facts, but upon the principle that the landlord has failed to prove that the holding bears any increased value as accommodation land over and above its ordinary letting value as a farm; in other words, that there is no evidence that the 10 per cent. increased value put upon this holding for "proximity" is due to a demand by people living in Dundrum for land of that character. It is not impossible that there may be holdings round Dundrum which bear such value, and should be excluded as "town-parks" from the Land Acts. But I find no evidence of such value attaching to this holding. The rent fixed by the agreement and the lease was not undertaken by a person living in the town, but by a new comer. There is no evidence that any other person wanted the land, or that any agricultural tenant had ever got it for less. A glance at the map shows that there are fields close to Dundrum laid out in a regular plan as if for accommodation lands; but M'Cann's holding is outside the circle within which these fields lie. The map and the report of the Assistant Commissioners show that this holding is at some distance, and is somewhat inaccessible. There is no startling discrepancy between the rent and the valuation. M'Cann pays £1 10*s.*, and Savage pays £1 6*s.* 6*d.* per acre, and neither rent is in itself large. No evidence whatever has been given of the letting value of any other land at or near Dundrum; and a large quantity of land suitable for accommodation is retained by the landlord in his own hands, *unlet*. He does not tell us what value it bears. If it is dearer than M'Cann's holding, that does not bear increased value. If the value is the same, the value of accommodation land near Dundrum is not enhanced. The issue here is whether this particular holding bears an increased value of a special kind, and on that point I say—"*Deficit probatio.*"

I must add that we are not dealing with this case under the

Act of 1887, sect. 9, and I guard myself against being supposed to decide that land taken, *eo nomine*, as a town-park by a townsman can be held to be "let as an ordinary agricultural farm."

I can see no material difference between the facts of *M'Cann's Case* and *Savage's Case*, and my judgment applies to both.

BARRY, L.J.:—

I was not one of the Judges who decided *Archer* v. *Caledon* (1); but now that I know what it decided, I wish to express my approval of the principles laid down in that case.

The question is as to the proper meaning of the word "town" where it occurs in section 58 of the Land Law, Ireland, Act, 1881. As in the case of many other words which have a popular signification it is impossible to formulate any precise definition which will serve as a test to solve any case which may arise involving the interpretation of the word. A difficulty arose some years ago, in determining the meaning of the same word in the Railways Clauses Consolidation Act, and the point was discussed in *Elliott* v. *South Devon Railway Company* (2). The Barons of the Exchequer, seem to have been in the main of opinion that to be a town within the meaning of that Act, a place must be an inhabited spot where the occupation is continuous, but they were unanimous that it was a jury question. The result of the judgments in that case is to leave us, as to any definition of the word, very much where we started. But there is one observation to be made upon the judgments which is that population is never once referred to by any of the Judges as the test. In the *Queen* v. *Cottle* (3), the meaning of the word "town" in a local and personal Act was discussed in a criminal case. The Judge at the trial had left the question to the jury, telling them that the word "towns" in the Act was to be understood in a popular sense; that a town was generally a congregation of houses: and that they were to say whether the spot was surrounded by houses so reasonably near that the inhabitants might be fairly said to dwell together. The jury brought in a verdict for the Crown, a new trial was sought, on the ground of misdirection and the case was

(1) *Ante*, p. 473. (2) 2 Exch. 725. (3) 16 Q. B. 412.

Appeal. 1894.

M'CANN, *Tenant;* DOWNSHIRE, *Landlord.*

Barry, L.J.

argued in the Queen's Bench. In giving judgment Lord Campbell, C.J., says:—"We think there was no misdirection in this case. The learned Judge, with much felicity, comprised in a few words all that was material in the language of the Barons of the Exchequer as to the definition of a town in *Elliott* v. *South Devon Railway Company* (1)." I am of opinion that to define "town" so as to meet every case is simply impossible; still, I think it is possible to point out elements material for determining the question as a question of fact. I am of opinion that population is a most important element; but it appears to me also that the ruling in *Archer* v. *Caledon* (2) was strictly correct—there must be such an assemblage of houses as raises the value of the land round it as accommodation land beyond what it would bear as an ordinary farm, and if there is such a congregation of houses in any case which may in ordinary language be called a town, we then have all the elements needed to establish that the place is a town within the meaning of the Act.

Finally, I wish to say that the one simple ground of my decision in the present case is that I think the landlord has failed to discharge the *onus* resting on him if he would have the Court conclude that this holding is a town-park. It has been stated in the argument that the Irish Land Commission would not have allowed evidence to be given of specific instances of letting in the neighbourhood of Dundrum, which would have proved that there was such an increased value as accommodation land borne by the land in that locality. But I can hardly think that such evidence could have been rejected. I know that in cases of the Ulster custom it always has been the rule to admit evidence that adjoining holdings on the same estate were subject to the custom as evidence that any particular holding enjoyed the same advantage.

Solicitor for the tenant: *H. C. Weir.*

Solicitors for the landlord: *Thomas Crozier & Son.*

G. Y. D.

(2) 2 Exch. 725.

(2) *Ante*, p. 473.

WARD, TENANT; CORBALLIS (TRUSTEE OF), LANDLORD (1).

Appeal.
1894.
April 24, 25.

Landlord and tenant—Land Law (Ireland) Act, 1887, *sect.* 4—*Subletting—Triviality.*

Whether a subletting is "trivial," within the meaning of section 4 of the Land Law (Ireland) Act, 1887, must be decided on all the circumstances of the case in which it is raised. It is a question of degree, into the determination of which the relative proportions existing between the size and rent of the subletting and the size and rent of the holding enter largely as elements, though not as absolute tests.

There was, without the landlord's consent, sublet an outlying portion of the tenant's holding, in respect of which there was no separate rating, though there was a house upon it in which the sub-tenant resided. The sub-tenant had been for forty-six years in occupation as tenant from year to year. The subletting consisted of 4A. 0R. 9P.; the holding consisted of 161A. 0R. 6P.; the rent of the sub-tenancy was £7; the rent of the holding was £204 18*s.* 4*d.* The house on the sublet portion was a poor structure. The quality of the land sublet was relatively inferior to that of the bulk of the holding:—

Held, that the subletting was "trivial," within the meaning of section 4 of the Land Law (Ireland) Act, 1881, and that the tenant was entitled to fix a fair rent.

APPEAL by the tenant from the order of the Irish Land Commission, dated 17th November, 1893, whereby the order of the Sub-Commission, fixing the fair rent of the holding was discharged, and the tenant's orginating notice dismissed.

The holding consisted of 161A. 0R. 6P. statute measure. The Government valuation fixed upon the entire holding was £179. The old rent was £204 18*s.* 4*d.*; the fair rent fixed by the Sub-Commission was £170; the Court-valuer's estimate of the fair rent was £175. A detached portion of the holding, consisting of 4A. 0R. 9P., statute measure, situate in the townland of Rowans, was at the date of the hearing before the Sub-Commission, and had been for at least forty-six years previously, in the occupation of a man called Michael Ward, as a yearly sub-tenant to the

(1) Before WALKER, C., PORTER, M.R., and FITZ GIBBON and BARRY, L.JJ.

Appeal. 1894.

WARD, *Tenant;* CORBALLIS, *Landlord.*

tenant of the holding, at a rent of £7 per annum. This detached portion is a quarter of a mile distant from another portion of the holding, also in the townland of Rowans, and about a mile distant from the bulk of the holding, which lies in the townland of Loughsalla. The land comprised in the subletting was proved to be of the worst quality of the land comprised in the holding, and was valued by the Court-valuers at fifteen shillings an acre. There was a poorly constructed house on the sublet portion, which it was not contended did not belong to the sub-tenant.

It also appeared before the Land Commission in the cross-examination of the tenant that he was in possession of the lands intermediate between the sublet portion and the other portion of the holding situate in Rowans; but on re-examination it was shown that he first took these intermediate lands only three or four years ago, and that he never held them, except under an eleven months' letting.

No evidence was offered that the landlord had consented to the subletting.

The Land Commission (Mr. Commissioner Fitz Gerald), dissenting, were of opinion that the subletting was not trivial, and made the order appealed from.

Meredith, Q.C., and *M. Kehoe*, for the appellant:—

This subletting is "trivial" within the meaning of sect. 4 of the Act of 1887: whether a subletting is "trivial" is largely a question of proportion; the latter part of the section contains the correlative term "substantial." The Court must take into consideration the area, rent, character, position, quality, and user, both of the holding and of the subletting, and then say, having regard to all the circumstances of the case, whether the subletting is so trivial that it does not prevent the tenant from being substantially in occupation of the entire holding. Here the area sublet is one-fortieth of the entire land: the rent paid by the sub-tenant is one twenty-ninth of the rent of the entire; the quality of the land sublet is inferior; the value of it is less than that of the rest of the holding: it is an outlying portion of the holding; the occupation of it by the sub-tenant does not prevent

the tenant, who is in actual occupation of the main portion of the holding, being substantially in occupation of the entire.

There is no reported case, since the passing of the Act of 1887, where a subletting so unimportant as this has been held fatal to the tenant's *status*. In *Kennedy* v. *Essex* (1) there were other sublettings, as well as that of the two acres to Hussey, and at the date of the originating notice the rent of the sublet portions amounted to £26, the entire rent being £300. Kennedy tried to save his *status* by getting up the two acres held by Hussey at £8 a-year, and then contended that the other sublettings, at a rent of £18 a-year, were trivial: he did not urge the subletting to Hussey was in itself trivial: he tried to treat it as altogether out of the case. That this is the true view of *Kennedy* v. *Essex* (1) is plain from the way that decision is treated in *Robinson* v. *Wakefield* (2). This latter case is an authority that the proportion existing between the rents of the holding and of the subletting is an important factor in such questions. Whether a subletting is trivial must, in every case be, as Fitz Gibbon, L.J., said in *Mulcaire* v. *Lane-Joynt* (3), "a relative question of degree." In *Rankin* v. *M'Murtry* (4) a subletting of one acre out of a farm of 43 acres, at a rent of £2 10*s*., the rent of the entire holding being £59, was held to be trivial: the same relative proportions of area and rent exist here. In *Robinson* v. *Wakefield* (2) the Lord Chief Baron states that the subletting made to Robinson of two acres at a rent of £4, the entire holding being 54 acres at a rent of £58 15*s*., might be considered trivial; this would be an *a fortiori* case.

Grace v. *Wall* (5) is distinguishable, because there the sublet portion of the holding had become non-agricultural.

T. P. Law, Q.C., and *Cherry*, for the respondent:—

White v. *White* (6) was a case of subletting to labourers. This subletting is in itself an agricultural holding within the Land Act. In *Kennedy* v. *Essex* (1) the subletting of two acres to Hussey, though it was determined, was assumed not to

(1) 28 L. R. Ir. 586.
(2) 30 L. R. Ir. 547.
(3) 32 L. R. Ir. at p. 694.
(4) 24 L. R. Ir. 290.
(5) Not reported.
(6) *Ante*, p. 573.

Appeal. 1894. WARD, *Tenant*; CORBALLIS, *Landlord.*

be trivial. *A fortiori* a subletting of a plot twice as large which cannot be put an end to, and in respect of which a fair rent can be be fixed, is not trivial. In *Mulcaire* v. *Lane-Joynt* (1) the Lord Chief Justice says:—"I do not think that the subletting of nearly five statute acres at a statutory rent of £4 10*s.* can be said to be trivial." Every circumstance must be taken into account: *Robinson* v. *Wakefield* (2). The isolated position of this sublet plot, in itself a fully equipped farm, shows that it is not trivial; the tenant must have set importance on it when he contracted to take it. In *Grace* v. *Wall* (3) a subletting far smaller and less important than that proved here, was held to put the tenant out of the Act of 1881.

Rankin v. *M'Murtry* (4) is distinguishable; there the landlord had consented to a subletting of a house, and the subletting of the field to the same sub-tenant was treated as appurtenant to the subletting of the house.

In *Hughes* v. *Patton* (5) the subletting contained 3A. 2R. 30P., the holding contained 173A. 0R. 17P., the rent paid by the sub-tenant was £5 10*s.*, and the rent paid by the tenant was £163 16*s.*; the Land Commission held the subletting was not trivial.

April 25. WALKER, C.:—

We are all of opinion that the view taken by Mr. Commissioner Fitz Gerald is right, and that the subletting in this case comes within the exception created by section 4 of the Land Law (Ireland) Act, 1887. I have been looking at what I said in *White* v. *White* (6), and I will read a few passages from my judgment in that case, which exactly state what I still think to be the law:—"The questions remain whether the sublettings are—(*a*) excluded by the terms of section 4 of the Act of 1887, and (*b*) whether they come within the second branch of that section as within the words 'when the subletting is of a trivial character, and the Court deems the tenant to be substantially in occupation of the holding'? On the first point the letting to Sullivan would

(1) 32 L. R. Ir. at p. 692.
(2) 30 L. R. I. 547.
(3) Not reported.
(4) 24 L. R. Ir. 290.
(5) 27 Ir. L. T. R. 117.
(6) *Ante*, p. 573.

apparently be saved by the first branch of the section, but that does not dispose of the question, as each of the other lettings exceeds half an acre in extent. In my opinion the second branch of the section must be deemed an independent enactment, otherwise, if there was one tenant labourer on a farm of 300 acres, whose holding was three quarters of an acre, the question of triviality under the second branch could not arise. The limitation of the half acre must be referred to the Labourers' Acts, and *qua* labourers no protection can exist when the half acre is exceeded. But I do not think that excludes the application of the second branch where it otherwise applies. The application of the second branch of the section in each case depends on a question of fact which involves a finding—(*a*) that the subletting is of a trivial character, and (*b*) what I think in some cases may be an addition, and is in all a sort of explanatory consequence, and a governing feature, viz. that the tenant is substantially in occupation of the holding. The main object, of course, was to get rid of the difficulty created by the cases of which *Maconchy* v. *Robertson* (1) is a leading example. I think, therefore, we are referred to the facts of this particular case for our decision in this, and no one case can be a certain guide for a decision on another." No doubt in *White* v. *White* (2) there were elements which do not exist in this case, but I think what I said there applies to all cases alike.

Mr. Cherry has argued that the trivial sublettings which are excused by the section are such as would confer no rights under the Land Acts, *e.g.* sublettings to labourers, and sublettings for a temporary purpose, and he has asked us to hold that a subletting cannot be trivial, if the sub-tenant can fix a fair rent against his own landlord in respect of it. But it is impossible so to limit the word "subletting." The first branch of the section deals with the case of a tenant who has made sublettings to labourers. The second branch must refer not to sublettings made to labourers, but to sublettings made to persons occupying the position of tenants. This is plain from the way it is worded. It says: "A tenant may *also* be deemed in occupation of his holding, notwithstanding that part is sublet when the subletting is of a trivial character."

(1) 18 L. R. Ir. 483. (2) *Ante*, p. 573.

Appeal. 1894.

WARD, *Tenant:* CORBALLIS, *Landlord.*

Walker, C.

The question whether a subletting is of a trivial character must (as I have said) be decided on the facts of the case in which it is raised. One element to be considered in discussing the question is the proportion between the area of the holding and the area of the portion sublet; another element to be borne in mind is the proportion between the rent paid by the sub-tenant and the rent paid by the tenant. These are both important elements, though they do not amount to conclusive tests. Here the portion sublet is one-fortieth of the entire holding, and the rent paid by the sub-tenant is one twenty-ninth of the rent paid by the tenant. This tends to show that it is a very small and unimportant part of the holding. Further, we have the fact that the subletting is of an outlying portion of the holding. I think this is a material element in favour of the tenant, because, the tenant is not put out of occupation of the substantial portion of the holding by reason of the subletting of this outlying fragment. The fact that the tenant at present holds the grazing of the lands intervening between the main portion of the holding and this outlying piece does not increase the importance of the subletting, because he has only of late years taken these intermediate lands, and he never has had anything more than a letting of them for eleven months, while the subletting is of long standing, and is itself a tenancy from year to year. Then as to the value of the bit held by the sub-tenant, it is said by the Court valuers to be the worst bit of the farm, and to be value for only 15*s.* an acre. The Assistant Commissioners who inspected the land came to the conclusion that the portion sublet was trivial and unsubstantial, as compared with the rest of the holding. I think, having regard to the facts of the case, that this view, which was also taken by Mr. Commissioner Fitz Gerald, is right, and that the case must be remitted to the Land Commission to fix the fair rent.

PORTER, M. R.:—

I am of the same opinion. The question whether any particular subletting comes within the 4th section of the Act of 1887, is a question of fact to be decided on the circumstances of the particular case. It must be shown, not alone that the subletting was of a trivial character, but also that it is such that the

Court may, notwithstanding its existence, deem the tenant to be substantially in occupation of his holding.

I do not think any light will be thrown on this case by the facts of others previously decided, and I believe the decision we have now arrived at will afford but little help in like questions in future; for it is not possible that any rule can be laid down deciding what sublettings are trivial, so as to meet the circumstances of every case. The Legislature has, I suppose intentionally, used vague language, which the Courts must interpret as best they may.

In the present case the portion of the holding which is sublet consists of 4 acres out of 160. It is poor land, with a wretched house on it. It lies quite detached, and at a considerable distance from the rest of the holding. The subletting seems to have been made upwards of forty-six years ago, and has existed ever since. This shows that the portion of land comprised in it was not looked upon as an important part of the holding. If it had been thought of importance, as an integral part of the farm, it would have been taken up long ago, there being no legal difficulty in the way of so doing. The fact that this subletting has been so long allowed to continue shows that this piece is not really workable with the rest of the holding, or at least is of no use in connexion with it.

I do not wish to be taken as expressing an opinion, one way or the other, as to whether in the facts of this case there was or was not evidence that the landlord had consented to the subletting. No such question has been raised or argued, but it would certainly seem that he, too, did not think the subletting of sufficient importance to induce him to interfere and prevent it.

On all the facts of the case, and the question is, as I have said, one entirely of fact, I think anyone, looking merely at the circumstances I have referred to, and using the popular language of the statute in its popular sense, would be likely to describe Laurence Ward, the tenant, as being "substantially" in occupation of the holding, and the subletting of this little bit of it as being "trivial."

Appeal. 1894.

WARD, *Tenant*; CORBALLIS, *Landlord.*

FITZGIBBON, L.J. :—

I wish to read a passage from Mr. Bailey's judgment, because it shows what are the legitimate subjects of consideration in questions of this kind, and also indicates that he was very much in the same state of mind in which we are now at the end of the case. He says :—"The question of triviality remains. My colleagues, after an inspection of the lands, report that the portion sublet is far inferior in quality and value to the remainder of the land in the holding. It comprises about one-fortieth of the area of the holding, and taking the evidence of Mr. Bobbett and of Mr. M'Cormack, who valued for the tenant, the sublet part is also in value about one-fortieth of the entire. It would appear to me that some regard must be had to the question of proportion, and, though with some doubt as to the ultimate decision in the case, I am of opinion that we should regard the subletting as trivial, and fix a fair rent."

Has the word "trivial" an absolute meaning, or is it a relative term? As used in this section, it must be a relative term. The structure of the sentence shows this. I think the two branches of the clause are correlative. No doubt two conditions must be fulfilled: the subletting must be of a trivial character, and the tenant must be substantially in occupation. But I think that, on the proper construction of the clause, any case which answers one branch of it answers the other. The conditions are not cumulative, but correlative, and mutually explanatory. If a subletting is trivial, the result will be that the tenant is substantially in occupation; and conversely, if the tenant is substantially in occupation, the result will be that any subletting he has made is trivial. The defect or break in his occupation may not be "so deep as a well," or "so wide as a church door," but the question is whether "'tis enough, 'twill serve," and we must judge of its gravity and effect by looking to every circumstance of the case.

The circumstance that the sublet plot is an outlying portion of the holding appears to me, in this case, to be in favour of the tenant, by making it more trivial. In another case the same circumstance might tend to show the subletting to be more important, and so might tell in favour of the landlord.

Here it is a small cottier holding of agricultural land, complete in itself, in no way interfering with or affecting the occupation of the rest of the holding. The most convenient way of dealing with it is proved, by forty-six years' experience, to be to sublet it to a cottier. If the cottier had been employed as a labourer on the main holding, *White* v. *White* (1) would be in point; but even as it is, the subletting does not appreciably interfere with the substantial occupation and user of the holding.

Now, take the Freshford case, *Grace* v. *Eyre* (2). There also the sublet portion was separate, but it was a town lot, of a different character from the rest of the holding, which lay at some distance. There was some reason to believe that the town lot had originally been the residence of the tenant of the whole. There seemed to have been several such holdings at Freshford, just as in the agricultural parts of Germany the farmers live in villages, and not on their agricultural land, which lies around. Thus, in *Grace* v. *Eyre* (2) the sublet portion had been originally an integral and important part of the holding; but when separated, it acquired a different and non-agricultural character; and as it was of appreciable value in itself, and by itself was outside the Land Acts, a question of jurisdiction arose, distinct from the mere question of triviality of the subletting. In *Grace* v. *Eyre* (2) I thought the town plot of substantial value, and I also thought that its separate existence and urban character brought the case into that class of which the most typical is the tolls case, *Wall* v. *Eyre* (3), where part of the subject-matter is beyond the jurisdiction of the Land Commission.

Besides the relative size and value and the cottier character of the sublet portion in this case, all of which go to show its relative triviality, certain other circumstances tend in the same direction. For instance, there is no separate rating of it, and the tenant of the whole is rated as the occupier.

It has been said, and I admit, that the subletting is not "of a trivial character" to the man who occupies under it. To the cottier it is anything but trivial. But this cannot have been the test, according to the intention of the Legislature. No subletting could be trivial in that sense, unless indeed it was such a case as

(1) *Ante*, p. 573. (2) Not reported. (3) 32 L. R. Ir. 475.

Appeal. 1894.

WARD, *Tenant;* CORBALLIS, *Landlord.*

Fitz Gibbon, L.J.

the pig-sty, put by the Master of the Rolls in *Beamish* v. *Crowley* (1); and if we were to go back to that principle, we should simply ignore the Act of 1887, which makes "triviality" a question of degree.

After all, I come back to Mr. Bailey's opinion. The question, under the Act of 1887, is one largely of proportion, of relative importance; as I said in *Mulcaire* v. *Lane-Joynt* (2), it is now a question of degree. The Act of Parliament which made it a question of degree has given us no test, no guide, no scale; but it has ordered us to decide the question in each case, and we can only carefully consider all the facts and circumstances, and to decide by rule of thumb, and according to popular and practical notions. In this case, taking all the facts into account, I think "the man in the street" would say that Laurence Ward is substantially in occupation of this holding, and that the subletting of the cottier plot to Michael Ward is "trivial," so far as the entire holding is concerned, whatever it may be in itself. Even if Michael Ward could fix a fair rent against Laurence Ward, that would only show that his little holding was within the Land Acts, and there is no conceivable reason why a subletting, in spite of which a tenant should be deemed to be still in occupation, if the landlord had consented to it, should, though relatively so trivial that the landlord had not thought about it, or the tenant had not asked leave, be fatal to the tenant's occupation of the rest.

BARRY, L.J.:—

I concur. I adopt very freely the judgment of Mr. Bailey, and the lucid judgment of Mr. Commissioner FitzGerald, in which I think he has clearly stated the grounds on which cases of this kind must be decided. Triviality is a question of fact, into which the element of proportion must enter largely. But it is only as one of the elements on which the question is to be decided that weight is to be attached to the proportionate value and size of the subletting. I deny the possibility of laying down any sym-

(1) 16 L. R. Ir. 279. (2) 32 L. R. Ir. 683.

metrical method of determining whether a subletting is trivial which can be applied in every case. I do not think that either FitzGibbon, L.J., or I laid down in *Kennedy* v. *Essex* (1) that a subletting of a piece of a holding 2 acres in extent must necessarily be not trivial. That case resolved itself into two branches: first, there was a subletting of six houses, and it was contended that this was cured in two ways—(*a*) because it was trivial, and (*b*) because, on the terms of the lease, and by reason of his conduct, the landlord must have been taken to have consented to the houses being sublet. On this branch of the case I agreed with the other members of the Court that the subletting of the houses was not trivial; but though I was inclined to differ from my colleagues on the question of consent, I did not press the doubts I felt to the extent of dissenting, because I agreed with them that the other branch of the case put the tenant outside the Land Act of 1887. The second branch of the case was concerned with a subletting of 2 acres, made to a man named Hussey, at a rent of £8 *per annum*. The tenant did not contend that this subletting was trivial; but he sought to get over the difficulty created by it in a totally different way. One week before the case came into Court, but long after he had served his originating notice, he took up the land from his sub-tenant in order to qualify himself for having a fair rent fixed. The course which he thus took plainly showed that the tenant himself admitted that the subletting to Hussey could not be deemed trivial; and, as I have said, the point was not even argued, so that all that this Court decided in respect of Hussey's subletting was that its existence made a valid objection to the *status* of the tenant at the time when he sought to have his fair rent fixed.

In this particular case there are a variety of circumstances which, taken together, go to show that the subletting is trivial. The length of time for which the subletting has subsisted is one of these. It is impossible not to feel the cogency of the argument, that if this subletting had amounted to an interference with the occupation of the tenant, it would not have been allowed to continue so long. Then, there is the proportion existing between the

(1) 28 L. R. Ir. 586.

Appeal. 1894. WARD, *Tenant*; CORBALLIS, *Landlord.* Barry, L.J.

bulk of the holding and the bulk of the subletting. That also is an element in the case; though, as I have said, it is no more than an element. Besides, there is the quality and value of the land sublet, and the distance which separates it from the rest of the holding. Each of these circumstances is to be weighed and considered. The fact that a subletting is 2 acres in extent affords no absolute test whether that subletting is trivial. In one case a subletting of that size might be trivial; in another case it might be one of the most important parts of the farm.

Taking all the facts of this case into consideration, I am of opinion that this subletting must be treated as of a trivial character.

Solicitor for the tenant: *Kilbride.*
Solicitors for the landlord: *Wm. Fry & Son.*

G. Y. D.

Appeal. 1894. April 23.

RONAN *v.* KING (1).

Sale by sheriff under writ of fi. fa.—*Tenancy from year to year—Sale of judgment debtor's "chattel interest (if any)"—Sale of a speculation—Effect of existence of outstanding legal mortgage—Notice—Deposit paid—"Failure of consideration."*

A sheriff, under a writ of *fi. fa.*, seized and set up for sale "the chattel interest (if any)" of an execution-debtor in a tenancy from year to year, giving full notice to intending purchasers of the fact that it was alleged that there was a legal mortgage thereon outstanding, but without inquiring further into the existence or validity of such alleged mortgage. It subsequently was proved that the mortgage was a valid and legal one. The purchaser rescinded before conveyance, and brought an action to recover the amount of his deposit, as paid upon a consideration that had wholly failed:—

Held (affirming the Queen's Bench Division), that the sheriff sold a speculation merely, and that the plaintiff was not entitled to recover.

Griffin v. *Caddell* (Ir. R. 9 C. L. 488) and *Kearney* v. *Ryan* (2 L. R. Ir. 61) discussed.

(1) Before WALKER, C., PALLES, C.B., and FITZ GIBBON and BARRY, L.JJ.

APPEAL by the plaintiff from the order made by the Queen's Bench Division, refusing a new trial of the action.

The facts of the case have been already reported, *ante*, p. 61.

Houston, Q.C., and *Molony*, for the appellant.

Ronan, Q.C., and *H. G. Richards*, for the respondent.

The arguments were the same as already reported in the Court below.

WALKER, C. :—

We are all of opinion that the result at which the Queen's Bench Division has arrived is right.

It is not necessary for us to give any opinion as to whether *Griffin* v. *Caddell* (1) is rightly decided. That case largely turned on the conveyance having been executed, and having been one of the counsel in it myself, I well remember that it was strongly contended during the argument that, as the deed was executed, the purchaser was remitted to his remedy under it.

The question here turns on the construction of the particulars and the conditions of sale. There is no proof of fraud. On the contrary, it is admitted that fraud is out of the case, because the statement of claim contained a paragraph alleging that the sheriff sold what he knew he had no right to sell; but that allegation was abandoned at the trial, and at the close of the evidence a course was adopted which virtually amounted to leaving it to the Judge to draw the proper conclusions of fact. He seems to have concluded, as an inference of fact, that the sheriff purported to sell something—an equitable interest. The inference which he thus drew was very much like what the jury were allowed to find in *Kearney* v. *Ryan* (2). But it seems to me to be more properly a question of construction of the terms of the contract than a question of fact.

In *Kearney* v. *Ryan* (2), I think, Lord Chancellor Ball lays down too wide a proposition, if he meant it to be read alone,

(1) Ir. R. 9 C. L. 488. (2) 2 L. R. Ir. 61.

Appeal. 1894. RONAN v. KING. Walker, C.

where he says:—"The contract has never been completed; neither conveyance, nor possession, nor benefit of any kind has flowed from it to the purchaser. Where that is the case, in an action for money had and received (which the present is), the purchaser can recover back a deposit upon total failure of consideration." Probably, however, the learned Lord Chancellor meant this proposition to be taken in connexion with the passage that follows it, and, in my opinion, the law is rightly stated in this second passage, if it be read—as it is plain it should be read—without a full stop after the word "convey." He says:—"This, in a sheriff's sale would, it appears to me, be the case if he professed to sell what he could neither seize nor convey, suppose, an equity of redemption: there the contract could, I think, be rescinded, and a deposit, if paid, should be restored." I am quite content to test this case by that statement of the law, and to see whether the canon there laid down applies to the facts proved here. May, C.J., says virtually the same thing, and Christian, L.J., rests his whole judgment on the finding of the jury in that case, and says: "With that finding for a basis, I look upon the case as beyond the reach of a reasonable doubt. Without that finding, I think it would be far from being free from doubt; for if the subject of the sale had been, to the apprehension of both parties, what was insisted by the defendant's counsel—that is to say, Power's interest, whatever it was, more or less, anything or nothing, so that the plaintiff knowingly purchased a speculation—still more, if the subject had been nominally and avowedly what Mr. Dames suggested that it was—a tenancy from year to year in Power, raised by the rights acquired by him and his wife, although defeasible by the administrator of M'Cormack, if any such should be raised within twenty years from his death—if this was the thing which had been sold and bought, why then, as the plaintiff would have deliberately taken his chance, and could have got what he bargained for, I should see great difficulty in holding that he could recover back his deposit in this action for money had and received for his use, on the ground of a total failure of consideration."

Now, take up the particulars of the property sold, as described by the sheriff and signed by the plaintiff:—"Particulars and conditions of sale by auction, held this day at Roscommon, under

which such chattel interest (if any) as the defendant Stephen Ronan now has in the lands of Cloonfad East, &c., held by the defendant, under A. Logan, continued in the name of R. P. P. Logan, at the yearly rent of £7, is offered for sale; such chattel interest being seized under and by virtue of Her Majesty's writ of *fieri facias* in this cause." It is very important that this sale was a sale by a sheriff. As sheriff, it was not lawful for him to seize and sell an equity of redemption. I think the particulars show plainly that it was only as sheriff that the defendant purported to sell. "The chattel interest (if any)" which he professes to sell is such a chattel interest as is capable of being seized by a sheriff, under and by virtue of a writ of *fieri facias*.

The first and second conditions of sale show that this was the true meaning of the contract. The first says:—"That the premises are sold for such chattel interest (if any) as the defendant may now have under the said recited tenancy, and that the highest bidder shall be the purchaser, subject to the said rent, or such greater or less rent, as same may be held at, together with all arrears of rent now due thereon, and all other charges (if any) legally affecting such lands." The second condition is:—"That the sheriff will not covenant for title, but will assign such chattel interest only (if any) as the defendant may have in the premises; and the purchaser will not be entitled to any evidence of the defendant's title, and will be bound to accept the statement herein contained at his own risk."

I do not think the other conditions of sale throw much light on the case. Condition 7 has been referred to; but, in my opinion, it is merely a general condition that the sheriff only sells in his official character.

It is plain, on the authorities, that chances or possibilities, if fairly stated, may be sold. Once this is conceded, it is impossible, as Lord Justice FitzGibbon has said during the argument, to subdivide the possibilities. The possibilities which the sheriff purported to sell here included the chance of the mortgage not being executed, and the chance of the mortgage, if executed, being void against creditors. In effect, the sheriff told the purchaser:—"I have a writ against Stephen Ronan. He appears to have a chattel interest in a farm. I cannot guarantee that I can give title to it;

Appeal. 1894.

RONAN v. KING.

Walker, C.

but if I can seize it and sell it, I will sell it to you. However, yours is the risk, not mine."

I therefore think this case comes within the *dicta* of Ball, C., and Christian, L.J., in *Kearney* v. *Ryan* (1), which, I think rightly, declare the law—that if a man buys a speculation he cannot recover his purchase-money if the speculation turns out to be worthless.

PALLES, C.B., and FITZGIBBON and BARRY, L.JJ., concurred.

Solicitor for the appellant: *W. T. Sheridan.*
Solicitors for the respondent: *Goodbody & Tisdall.*

G. Y. D.

Q. B. Div. 1894.

Feb. 14.

PARKE *v.* ULSTER BANK (LIMITED) (2).

(1894. No. 1085.)

Practice—Administration action—Staying proceedings.

W. P. deposited with the U. Bank, as security for a loan, two leases, alleged to be the property of H. P., wife of W. P. W. P. having died, an action for the administration of his personal estate was brought against his personal representative by the U. Bank. H. P. was not a party to this action. H. P. having brought an action against the U. Bank to recover the leases:—

Held, that this latter action should not be stayed pending the administration action, as the full relief claimed by the plaintiff could not be given in the administration action.

THE action was brought by the plaintiff Henrietta Parke, to recover two indentures of lease, which were alleged to be the plaintiff's property, and which had been deposited by her husband, William Parke, by way of security for moneys advanced to him by the defendants, and for damages for their detention.

William Parke died on the 6th January, 1893, intestate. At

(1) 2 L. R. Ir. 61. (2) Before O'BRIEN, JOHNSON, and GIBSON, JJ.

that date he owed the defendants a sum of £215 2*s.* 2*d.* On the 21st February administration to his personal estate was taken out by William H. Parke, and, on the 8th January, 1894, the defendants caused a summons for the administration of Wm. Parke's personal estate to be issued against William H. Parke, as his administrator. Henrietta Parke was not a party to this proceeding. On the 29th January, 1894, this summons came on for hearing, and the Vice-Chancellor made an order for administration. On the 31st January, 1894, the writ in this action was issued.

W. M. Jellett, for the defendants, moved for an order that all proceedings in this action be stayed till further order:—

The questions in dispute in this action can be decided by the Vice-Chancellor in the administration proceedings. The Vice-Chancellor has jurisdiction to determine whether the leases belonged to William Parke or not, and that is the real matter in issue in this action. The policy of the Judicature Act is to prevent a multiplicity of suits: Supreme Court of Judicature Act (Ireland), 1877, section 27, sub-sections 5 and 7; *Stubbs' Estate* (1); *Wright* v. *Redgrave* (2); *Searle* v. *Choat* (3).

Molyneux Barton, for the plaintiff:—

The Vice-Chancellor has no jurisdiction to decide the questions at issue in this action, as the plaintiff is no party to the suit before him. Moreover, he could not give her all the relief claimed by her, should he find in her favour.

W. M. Jellett, in reply:—

The plaintiff can be served with the order for administration, and she will then become a party to the administration proceedings.

O'BRIEN, J.:—

Although this case was argued with great ability by Mr. Jellett, we have all come to the conclusion that this motion must be refused. The duty of the Vice-Chancellor in the proceedings

(1) 8 Ch. Div. 154. (2) 11 Ch. Div. 24. (3) 25 Ch. Div. 723.

Q. B. Div. 1894. PARKE v. ULSTER BANK

in his Court to administer the assets of William Parke does not involve jurisdiction to determine the questions at issue between the plaintiff and the defendants, nor enable him to give the plaintiff, should she be in the right, the entire relief sought in this action.

Solicitor for the plaintiff: *Herbert Malley.*
Solicitor for the defendants: *Robert H. Beauchamp.*

G. G.

Ex. Div. 1894. April 20, 23.

M'KIBBIN AND CORDUKES *v.* M'CLELLAND (1).

(1894. No. 1190.)

Practice—Time—Holidays—Time for pleading—Judgment by default—R. S. C. Ir., Order LXIV., R. 3.

The time for appearing to a specially indorsed writ expired on the 23rd March, on which, being Good Friday, the offices of the Court were closed, and they did not re-open until the 28th, on which day an appearance was entered:—

Held, that the time for delivering a statement of defence did not begin to run until the 28th.

MOTION, by the defendant, to set aside the judgment entered by the plaintiffs in default of defence.

The action was brought on a specially indorsed writ. The writ was served on the 13th March, 1894, and the time for entering an appearance thereto expired on the 23rd March, 1894. The 23rd March was Good Friday, on which day the offices were closed. The offices were re-opened on Wednesday, the 28th March, on which day the appearance was entered. The plaintiffs entered judgment in default of defence on the 3rd April.

Cuming, for the defendant:—

Judgment was prematurely marked on the 3rd April. The

(1) Before PALLES, C.B., and MURPHY, J.

defendant had till the 7th April to enter his defence. Appearance must be entered within ten days from service of the writ: R. S. C. Ir., Order XII., R. 1. Therefore, the time for entering appearance expired on the 23rd March. But that day was Good Friday, on which the offices were closed, and they remained closed till Wednesday, the 28th March. The defendant had till the 28th March to enter an appearance, on which day it was regularly entered: Order LXIV., R. 3. The defendant had ten days "from the time limited for appearance" (namely, the 28th March) to enter his defence: Order XXI., R. 6; that is, till the 7th April. The combined effect of Order LXIV., R. 3, and Order XXI, R. 6, is to extend the time for entering defence, and to compute the same from the day on which appearance was actually and regularly entered, namely, the 28th March.

Ignatius O'Brien, contra:—

The "time limited for appearance" (Order XXI., R. 6) is the ten days mentioned in the writ. The effect of Order LXIV., R. 3, is that the entry of the appearance on the 28th March (which was quite regular) should be "held to be duly done" on the 23rd March, on which day the ten days for appearance expired. Therefore the ten days for entering defence should be computed from the 23rd, and such time would expire on the 2nd April. And so, the plaintiffs were entitled to enter judgment on the 3rd April.

Cur. adv. vult.

April 23.

PALLES, C. B.:—

This was an application to set aside a judgment, as having been marked prematurely. The question arose on the construction of Order XXI., Rule 6, which provides that "where a statement of claim is delivered to a defendant, he shall deliver his defence within ten days from the delivery of the statement of claim, or from the *time limited for appearance*, whichever shall be last." The writ was served on the 13th March, and thus, under ordinary circumstances, the last day for entering an appearance would have been the 23rd. That day happened to be Good Friday, on which day the offices were closed. They did not

Ex. Div. 1894.

M'Kibbin & Cordukes v. M'Clelland

Palles, C.B.

re-open till the following Wednesday, the 28th, on which day the appearance was entered, and it was unquestionably regular. The question is, does the period of ten days for delivering the defence run from the 28th or from the 23rd? The Rule says it is to run "from the time limited for appearance." What does this expression mean? Is it the time limited by the writ, or the time limited by the Rules, taking the code as a whole?

Order LXIV., Rule 3, provides that "where the time for doing any act . . . expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act . . . cannot be done on that day, such act . . . shall, so far as regards the time of doing . . . the same, be held to be duly done . . . if done . . . on the day on which the offices shall next be open."

It was argued by Mr. O'Brien that the meaning of the expression "the time limited for appearance" is the time mentioned in the writ, or, at least, that prescribed by Order XII., Rule 1; and that the only effect of Order LXIV., Rule 3, is that the appearance, although entered on the 28th, should be "held to be duly done," *i.e.* done within the time limited, and that therefore it was to be taken as if entered on the 23rd.

On the other hand, it was contended for the defendant that "the time limited" means the time limited by the Rules, taken as a whole; that the effect of Order LXIV., Rule 3, is to extend for all purposes the time for doing the act, which, when done, is for all purposes an act done as of the day upon which it was in fact done.

We are of opinion that the latter is the true meaning of the words in question, and that, in the present case, the ten days ran from the 28th, and not from the 23rd.

The judgment must, therefore, be set aside, with costs.

Murphy, J., concurred.

Solicitors for the plaintiffs: *Scallan & Co.*
Solicitor for the defendant: *A. Henry.*

J. P. B.

HODGENS *v.* KEON.

(1892. No. 5191.)

Ex. Div. 1893.
April 30.
May 2.
Appeal.
Nov. 29.

Vendor and purchaser—Conditions of sale—Particulars—Agreement—Name of vendor—Auctioneer—I O U accepted for deposit—Consideration—Account stated—Right of action.

An agreement for sale of leasehold property annexed to the descriptive particulars and conditions of sale acknowledged the purchase of the premises described in the particulars, and contracted for completion subject to the conditions. The particulars identified the leases by dates, terms, and reserved rents; and one of the conditions described the vendor as executrix of the assignee of the lessee, but the vendor's name did not otherwise expressly, or by reference, appear in the agreement.

In an action involving the validity of the agreement, the objection that the vendor's name did not appear in it was not made at the trial, in which a verdict and judgment was entered for the plaintiff:—

Held, that the leases, the assignment and will of the vendor's testator might have been given in evidence to displace the objection if taken at the trial; and that it was too late to raise the point upon a motion to enter the verdict and judgment for the defendant.

Under the conditions of sale the deposit was payable to the auctioneer immediately after the sale. The auctioneer, without the consent of the vendor, took the purchaser's I O U for the amount:—

Held, that an action lay at suit of the auctioneer against the purchaser for the amount of the I O U.

New Trial Motion.

The action was brought to recover £175, money payable by the defendant to the plaintiff on foot of an account stated and settled between them on the 21st October, 1892, upon foot of the purchase-money of the licensed premises, No. 28, Grafton-street, Dublin.

On the 30th November, 1892, the defendant served on one W. J. Johnston a third party notice, claiming to be indemnified, on the ground that the defendant signed the I O U solely as agent for said W. J. Johnston. On the same date the defendant delivered his defence, whereby he traversed the allegations contained

Ex. Div. 1893. HODGENS v. KEON.

in the statement of claim; and pleaded that he signed the said account as agent for W. J. Johnston, and said the plaintiff was well aware of the fact, before said account was signed, that the defendant was to sign same as such agent, and was not to make himself liable as principal thereon, for the defendant signed the said account in the following manner: "Thomas O'B. Keon, in trust"; and that the plaintiff was well aware that the person for whom the defendant signed in trust was the said W. J. Johnston, and that he had power to bind the said W. J. Johnston, and that the said W. J. Johnston was bound by the said account, and that the said W. J. Johnston was liable to be sued on same. The plaintiff joined issue, and the third party entered an appearance.

The action was tried before Mr. Justice Gibson and a jury of the city of Dublin in the Hilary Sittings, 1893, when it appeared that the plaintiff, who was an auctioneer, had been employed by Miss Fortune in September, 1892, to sell the interest vested in her, as executrix, in a public-house, No. 28, Grafton-street, Dublin. The sale took place on the 21st October, 1892, subject to conditions, of which No. 3 was as follows:—

"The purchaser shall, immediately after the sale, pay to the auctioneer a deposit of one-fourth of the purchase-money, and sign the annexed agreement to complete the purchase according to these conditions. The purchaser shall, at the time of making the said payment on account of the purchase-money, pay to the auctioneer auction fees at the rate of £5 per cent. on the amount of the purchase-money."

The defendant Keon, who was a commission agent, attended the sale, and bid £700, for which the property was knocked down, and Keon was declared purchaser. The auctioneer's clerk asked for the deposit, when Keon signed an I O U for the amount of the deposit, and handed it to the clerk. Keon afterwards signed the agreement for sale, adding the words "in trust."

The agreement, which was annexed to the particulars and conditions, was as follows:—

MEMORANDUM.

I hereby acknowledge that at the sale by public auction of the premises described in the within particulars held this day, I was declared the purchaser of same, at the sum of £700, and I have paid to the auctioneer the sum of £175

as a deposit, in part payment of the purchase-money, and I undertake to pay the remainder of the purchase-money, and to complete the sale in accordance with the within conditions.

Dated, &c.

In condition No. 12 it was stated that the vendor was selling as executrix of the assignee of the lessee, but the name of the vendor was not stated in either the particulars, conditions, or agreement.

The above facts, as to which there was no controversy, are alone material for the points here reported.

Much conflicting evidence was adduced as to the liability of Johnston. The jury found, amongst other questions, that the I O U was given to the plaintiff Hodgens personally. They found in favour of Johnston on the questions submitted with reference to his liability. The learned Judge entered judgment in the action for the plaintiff, and on the third party notice for Johnston.

The defendant moved to enter the verdict and judgment for him, or, in the alternative, for a new trial, on the ground that the verdict in favour of Johnston was against the weight of evidence.

Bushe, Q.C., Campbell, Q.C., and *Jefferson*, for the defendant.

Ronan, Q.C., and *Joyce*, for the plaintiff.

O'Shaughnessy, Q.C., and *John Murray*, for Johnston.

Cur. adv. vult.

PALLES, C. B. :—

May 2.

The difficulty which I suggested at the commencement of the argument, by reason of the vendor's name not appearing in the agreement, was sufficiently answered by Mr. Ronan, who has satisfied me that the description of the premises as being held under leases sufficiently described to be identified, and the statement in the 12th condition that "the vendor is selling as the executrix of the assignee of the lessee," would have authorized us to look at those leases, their assignment, and the will of the vendor's testator (had they been in evidence), to ascertain the name of such vendor. If, therefore, the objection had been taken at the trial, evidence could have been given to remove it; and as it was not taken, in my opinion we ought not now to entertain it.

[Ex. Dir. 1893. HODGENS v. KEON. Palles, C.B.

The next point, although a narrow one, is of more difficulty. An agreement by an auctioneer to accept an I O U, payable to himself, as cash (which, under the conditions of purchase, is payable "immediately after the sale"), operates differently, according as it is made with or without the consent of the vendor. When made with such consent, the acceptance of the I O U extinguishes the obligation as to the deposit under the conditions, and the I O U is evidence that the money which it represents was lent by the auctioneer to the purchaser. Such was the case of *Cleave* v. *Moors* (1).

On the other hand, where the agreement is without such consent, there can be no extinguishment of the obligation to the vendor to pay the deposit as provided by the conditions. In that event the agreement by the auctioneer, as agent, involves a warranty by him of authority to make it; and it may be that, until the consideration is in part executed, the purchaser may rescind. In the present case, however, the consideration was executed. When the auctioneer ascertained that the purchaser was not prepared to pay the deposit forthwith, in accordance with the conditions, it was his duty to the vendor, either to have declared the negociation for the bargain at an end, or, at least, to have ascertained from her whether she would consent to his receiving the I O U. By accepting it without her consent, as cash, he plainly incurred a liability to her. There is evidence that this acceptance was at the request of the defendant, and it therefore constituted a sufficient consideration for a promise by the defendant to the plaintiff, from whom the consideration moved. If authority be required for this, it will be found in the judgments of Tindal, C.J., and Gaselee, J., in *Willats* v. *Kennedy* (2). There Tindal, C.J., says:—"It was his" (the plaintiff's) "duty to require the debtor to pay, and the duty of the debtor to pay him. The contract, therefore, to forbear to proceed against the debtor was a contract from which the plaintiff *might incur a detriment*, and it is a sufficient consideration for a contract if one party receives a benefit, *or* the other is exposed to a detriment, from it." Gaselee, J., adds:—"He" (the plaintiff) "is responsible to the

(1) 3 Jur. (N. S.) 48. (2) 8 Bing. 5.

Court by which he was appointed. By giving time, he has incurred a responsibility, which is a sufficient detriment to form the consideration for the defendant's promise." No doubt, the judgments of Bosanquet and Alderson, JJ., are put upon another ground, viz. the authority of the receiver to make the contract; and possibly Gaselee, J., entertained the same opinion as a separate ground for his judgment; but the judgment of Tindal, C.J., is rested entirely upon the possible detriment to the plaintiff; and indeed, even without this authority, the point is sufficiently clear.

The consideration, then, being the plaintiff's acceptance of the I O U, with the liability he thereby incurred to the vendor, the I O U has been actually accepted, and the liability actually incurred. The consideration is therefore executed, and there is plain evidence of a contract in fact by the defendant with the plaintiff that, for this consideration, the defendant would pay the plaintiff the deposit forthwith.

It is unnecessary to consider whether this promise need be in writing, under the Statute of Frauds, because undoubtedly it constituted the defendant the direct debtor to the plaintiff of a sum of money payable *in præsenti*, and was therefore a sufficient subject-matter for an account stated; and *Wilson* v. *Marshall* (1), by which we are bound, decides that where, as here, there has been an account stated, the want of a writing cannot be availed of, even where such writing is essential to an action on the contract.

The distinction between the present case and *Lemere* v. *Elliott* (2) is, that in that case no part of the purchase-money was payable until completion, a period which had not arrived when the I O U was given. Here the sum of money sought to be recovered was, by the conditions of sale, payable *in præsenti*.

The main argument for the defendant is that, notwithstanding payment to the plaintiff of the amount of the I O U, he will remain liable to an action for damages by the vendor for non-payment in the mode provided by the conditions. This may be so; but it does not necessarily follow that he is not also liable to the plaintiff. In such a case and also, as it seems to me, in a case like the present, occurring before the Judicature Act, the defendant could have

(1) Ir. R. 2 C. L. 356. (2) 6 H. & N. 656.

Ex. Div. 1893. HODGENS v. KEON. Palles, C.B.

filed a bill in Chancery against the plaintiff and the vendor to restrain the action, upon his bringing the amount of the I O U into Court; and in the present action, he might have availed himself of the same defence against double liability, by counter-claim against the plaintiff and the vendor. Any such proceeding, however, would have involved bringing into Court the amount of the deposit. For myself, I should be prepared, if the defendant were even now willing to bring in the amount, to direct that it should not be paid out to the plaintiff without notice to the vendor. But the mere existence of the double liability, under the circumstances of the case, cannot, as it appears to me, entitle the defendant to judgment in the action.

[His Lordship then proceeded to examine the evidence in detail, and in result held that the verdict in favour of Johnston (the third party) should stand, and that the defendant Keon should pay the costs of the plaintiff and Johnston.]

ANDREWS, J., concurred.

MURPHY, J., concurred with the other members of the Court, as to the right of the plaintiff to sue on the I O U, but differed from them as to the liability of Johnston.

J. P. B.

Appeal. 1893. Nov. 29.

The defendant appealed to the Court of Appeal (Walker, C., and FitzGibbon and Barry, L.JJ.).

The same counsel appeared for the parties who were heard in the Court below, but the sole question argued was as to the liability of Johnston.

THE COURT OF APPEAL affirmed the judgment of the Exchequer Division, and dismissed the appeal, with costs.

Solicitor for the plaintiff: *F. Kennedy.*
Solicitor for the defendant: *A. Henry.*
Solicitor for Mr. Johnston: *G. Byrne.*

R. D. M.

MACONCHY AND OTHERS *v.* TROWER.

H. L.
1893.
Nov. 24.

Contract—Principal and agent—Covering letter—Condition—Waiver.

T., who was desirous of floating a gold mining Company in England, sent, through his broker F., a letter to D., a Dublin stockbroker, offering him a specified fee in consideration of the Company going to allotment, and D. allowing his name to be used as stockbroker. D. signed a letter of acceptance, which had also been forwarded to him by T., through F., and sent the acceptance to F. in a covering letter addressed to F., in which D. mentioned that he signed the acceptance on the distinct understanding that Messrs. H. (an English firm of stockbrokers) also joined. The Company's prospectus was issued, but instead of the Messrs. H., G. & Co., stockbrokers of equally high standing, appeared as the English brokers of the intended Company. D., who was only interested in not being associated with what were commonly known as mining brokers, made no objection to the substitution, did not withdraw his own name, and acted as Dublin broker until the Company went to allotment.

In an action for the fee:—

Held, 1, that the complete contract in T.'s letter and D.'s acceptance could not be varied by the covering letter addressed to F. as T.'s agent.

2, That, as matter of construction, the covering letter was not intended to make the contract conditional upon H. being the English brokers.

3, That even if such a condition were imported into the contract, it could be waived by D. being one for his benefit solely.

APPEAL by the plaintiffs from the judgment of the Court of Appeal dated the 2nd February, 1893, reversing the judgment of the Queen's Bench Division, dated the 21st December, 1892, which set aside the verdict and judgment entered for the defendant at the trial, and ordered a verdict and judgment to be entered up for the plaintiffs for one thousand guineas, and costs.

The action was brought by the plaintiffs as assignees in bankruptcy of Francis E. Du Bedat, formerly a stockbroker, to recover £1150, of which £1050 was claimed under a special contract for the use of Du Bedat's name as stockbroker for a company floated by the defendant, and the balance for commission and brokerage. The plaintiffs obtained leave to serve the writ on the defendant out of the jurisdiction: see 30 L. R. Ir. 480, where the writ of summons

H. L. 1893. MACONCHY *v.* TROWER.

and the material parts of the correspondence afterwards given in evidence at the trial will be found stated. The statement of defence, besides traversing the causes of action, pleaded specially, (*a*), that it was a term of the alleged contract that Du Bedat should do all he could to obtain applications in Ireland for shares in the Company, and that Du Bedat did not endeavour to obtain applications for shares, or otherwise forward the interests of the Company; (*b*), that the contract sued on was conditional on Messrs. Haggard, Hale, and Pixley being appointed the London brokers of the Company, which event did not happen, and the contract fell through; (*c*), that the contract was rescinded; (*d*), that the defendant was induced to enter into the alleged contract by the fraud of Du Bedat in representing that he was a solvent broker, able to push the Company, whereas he was insolvent. The plaintiffs replied by joining issue, and pleaded that it was by the act and default of the defendant that the said Haggard, Hale, and Pixley did not act as London brokers of the Company, and that the defendant, notwithstanding, acted upon and took advantage of the said contract; and also waiver of the condition before breach.

The action was tried before Sir P. O'Brien, C.J., and a special jury in the Trinity Sittings, 1892. The material letters are given at length in the report, 30 L. R. I. 480; and the other evidence so far as is necessary for the purposes of this report is sufficiently stated in the judgment of the Lord Chancellor, *infra*, p. 665.

The Lord Chief Justice directed the jury that the contract sued on was entered into, and in answer to questions left to them the jury found that Du Bedat did not do all he reasonably could to obtain shares and get shares underwritten; that the contract of October was rescinded; and that the defendant did not authorize Fox to write the letter of the 4th November, 1890. The Lord Chief Justice, on these findings, entered judgment for the defendant with costs. On motion by the plaintiffs, the Queen's Bench Division (Holmes, Gibson, and Madden, JJ.) set aside the verdict and judgment for the defendant, and ordered a verdict for one thousand guineas, and costs, to be entered for the plaintiffs. On the 2nd February, 1893, the Court of Appeal (Palles, C.B., and

Fitzgibbon, and Barry, L.JJ.) reversed the decision of the Queen's Bench Division.

The Attorney-General for Ireland; Gordon, Q.C., and *Courthope Monroe* (of the English bar), for the appellants.

The Right Hon. J. Atkinson, Q.C., and *Carson, Q.C.*, for the respondent.

LORD HERSCHELL, C. (1) :—

My Lords, this action is brought by the trustees in bankruptcy of Mr. Du Bedat, a bankrupt, to recover from the defendant the sum of 1000 guineas alleged to be due under an agreement entered into between Mr. Du Bedat and the present respondent. The respondent Mr. Trower was desirous of bringing out a company for the purchase of a gold mine, which was called in the first instance the Lucknow Company, and afterwards the Wentworth Gold Fields Proprietary Company. He had been brought into communication with Mr. Fox, who appears to have been a member of the firm of Musson and Company, stockbrokers at Liverpool, and there had been some negotiations between him and Musson & Company, and steps taken to arrange that Musson & Company should act as the Liverpool brokers, and the firm of Haggard, Hale, and Pixley as the London brokers. They were desirous of obtaining for the purposes of the Company, or, perhaps, I should rather say for the floating of the Company, the name of a Dublin broker on the prospectus, and, accordingly, Mr. Fox entered into communication with Mr. Du Bedat with a view to arranging that he should be the Dublin broker.

Certain letters passed between them upon which some reliance has been placed; as it seems to me more weight has been given to them in connection with the construction put upon the subsequent dealings of the parties than is their due; but a letter was written by Mr. Du Bedat on the 29th September to Captain Fox a relation of Mr. Fox, who was in Musson's firm, saying, "Our fee

(1) The following report of their Lordships' judgments has been kindly supplied by J. A. Maconchy, Esq., Official Assignee.

H. L. 1893. MACONCHY v. TROWER. Lord Herschell, C.

has always been £1000"; and on the same day Mr. Du Bedat telegraphs to Mr. Fox at Liverpool, "Our fee would be £1000 subject to approval with Haggard and yourselves. Have never received less." On the 1st October Mr. Trower writes to Mr. Fox at Musson's, saying, "I shall be pleased to accept the terms named by Mr. Du Bedat, viz. £1000, in consideration of his firm consenting to act as brokers in Dublin to the Lucknow Company." He encloses that in a more private letter beginning, "Dear Fox," in which he says: "I enclose letter of acceptance in respect to Mr. Du Bedat's offer to act as broker to our Company for a payment of £1000. If you consider that it will be decidedly to our advantage to secure Mr. Du Bedat's services, please consider the enclosed letter as binding. I have not seen Haggard to-day, but will try and do so later." Mr. Fox did not treat that letter, which was written by Mr. Trower to himself, as completing a contract with Mr. Du Bedat, and did not apparently communicate its terms to Mr. Du Bedat. But a few days afterwards, that being on the 1st October, on the 9th October Mr. Trower was at the office of Musson & Company in Liverpool; and there two letters were drawn up, the one of them a letter addressed by Mr. Trower to Mr. Du Bedat; the other a letter addressed by Mr. Du Bedat to Mr. Trower. They were drawn up in the office of the broker; the one which was addressed to Mr. Du Bedat was signed by Mr. Trower, the other was left with a blank for the signature of Mr. Du Bedat.

On the 9th October Mr. Fox writes to Mr. Du Bedat this letter:—"The name of the mine I wrote you about has been altered from Lucknow to Wentworth Gold Fields. I enclose you a letter from the vendor, who has been here to-day, and also one for you to sign, which please return me signed, if you approve. It is a copy of the one we have signed." He then speaks of bright views of the mine and of the Company, and adds this postscript, "Messrs. Haggard, Hale, and Pixley are the London brokers." In that letter were enclosed the two documents to which I have referred, which purported, on the face of them, to be documents by which a contract would be directly completed between the two principals and not a contract made through the agency of Musson or any other person; and, as I have said, he asked that the one

which was to be signed by Mr. Du Bedat should be returned signed if he approved.

My Lords, the letter signed by Mr. Trower was in these terms, so far as is material:—"I agree to pay you the sum of 1000 guineas in consideration of the Wentworth Gold Fields Proprietary Company, Limited, going to allotment, and you allowing your names to be used as brokers in Dublin for the above-named Company." It was for that that the 1000 guineas was to be paid, namely, his allowing his name to be used as broker, but it was to be payable only on condition that the Company went to allotment.

The other document, which was signed by Mr. Du Bedat, was in these terms:—"In consideration of your paying us the sum of 1000 guineas on the Wentworth Gold Fields Proprietary Company, Limited, going to allotment, we consent to our names being used on the prospectus as brokers for Dublin, and we will do all we can to obtain applications for shares amongst our friends, and get as many shares underwritten as we find it possible to do."

Now, it is suggested that there is some variance between those two documents, inasmuch as the first which I have read states that the consideration is to be "allowing your names to be used as brokers in Dublin," whilst the other is "we consent to our names being used on the prospectus as brokers for Dublin." My Lords, considering that these two documents were drawn up at the same time for the purpose of making a contract between the parties, to hold that when the two documents were signed there was a variance between them which prevented its being a contract would be a very strange proceeding, and one which ought not to to be adopted unless it was impossible to put any other rational construction upon the two documents. I find no difficulty in reading them as being completely reconcilable, and as meaning the same thing.

Well, my Lords, the letter signed by Mr. Trower was kept by Du Bedat, and the other letter, having been signed by him, was returned to Mr. Fox in a letter in these terms:—"Dear Mr. Fox,—I return Mr. Trower's letter, duly signed. Of course I sign on the distinct understanding that Messrs. Haggard and your firm also join."

My Lords, the first question which your Lordships have to

H. L. 1893.

MACONCHY v. TROWER.

Lord Herschell, C.

consider is whether the transmission of the document signed by Mr. Du Bedat, and addressed to Mr. Trower, in conjunction with the document signed by Mr. Trower, and kept by Mr. Du Bedat, created a complete contract between the parties, the whole of the terms of which are to be found in those two instruments, or whether a condition was imported into the contract, or the contract was made conditional upon the matter mentioned in the letter to Mr. Fox, in which the document addressed to Mr. Trower, and signed by Mr. Du Bedat, was enclosed. My Lords, I confess it seems to me that there would be very great danger in giving countenance to the view that where documents of this description are sent by a broker to one of the proposed principals in a transaction, and where these documents purport to be documents complete in themselves, and settling the matter as between the principals, and where one of those documents is retained and the other is returned to the broker, I say there would be very great danger in giving countenance to the idea that any language used in the letter to the broker in which the document signed by the principal is returned, could be treated as a condition to be imported into the document. Parties, of course, very frequently contract through an agent. No doubt when they contract through an agent what is said and done through and with the agent is as much a part of the transaction as if it had been said or done by or to the principals themselves. But where a principal is not content to trust to a negotiation by an agent, but desires to have the contract embodied in documents directly made between himself and the other principal to the transaction, on the face of which documents no intervention of an agent appears, it seems to me that both parties must have understood when they signed those documents that they were intended when signed to comprise everything that was to bind the two parties to the contract, and that as between them all the terms were therein included, and that if either party was unwilling to be bound by these terms he must have known that the proper course would be, before signing, to put any condition which he desired into the document that he signed, which would, of course, import that condition, and prevent there being any contract without it, unless the other party gave his consent: or to write direct to the party to whom he

was sending that contract signed by him, indicating that he did not sign it absolutely, but was only signing it conditionally.

My Lords, it seems to me that these considerations must be borne in mind when one is considering what is the real meaning of the letter written by Mr. Du Bedat to Mr. Fox. I am myself not satisfied (I will not go beyond that) that even if Mr. Du Bedat had intended by these words in his letter to Mr. Fox to make the agreement conditional upon the name of Messrs. Haggard being also on the prospectus as brokers, his writing this letter to Mr. Fox would have been effectual for that purpose. But, my Lords, beyond that I think that the true construction of this letter to Mr. Fox is not that it imported, or that it should be construed as intending to import, a condition into the contract, but that writing to Mr. Fox as he did—"I return Mr. Trower's letter, duly signed"—he must be taken to have indicated that as far as contract was concerned he approved of the terms, and was content to bind himself to them, but that as between him and Messrs. Musson he wished to impress upon them the fact that he had signed it on the understanding that Haggard and Musson were also to join; that it was for the purpose of impressing upon Musson, who had introduced this transaction to him, that inasmuch as he thought it of importance that they and Haggard should also be on the prospectus that must be borne in mind by them; that they must bear in mind that he had informed them of it, and that it was upon that understanding that he had bound himself to the contract, and not that he had made that addition to, or condition in, the contract. My Lords, that seems to me to give full effect to the language used by Mr. Du Bedat in his letter to Mr. Fox, and at the same time without doing violence to what otherwise seems to me to be the natural result of the transaction.

My Lords, for those reasons I think that the original contract was not conditional at all, that it was absolute and complete as soon as that letter signed by Mr. Du Bedat was put into the Dublin Post Office. But even if there were a condition made that Haggard's name should be on the prospectus it cannot, as it seems to me, be disputed that it was open to Mr. Du Bedat to waive it; or if his waiver would not be sufficient, it was open to both parties to agree to dispense with that condition, and to

H. L. 1893.

MACONCHY v. TROWER.

Lord Herschell, C.

substitute some other name for that of Messrs. Haggard. Certainly it seems to me that the condition was a condition which Mr. Du Bedat sought to insert for his own benefit and protection. He did not thereby, as I read it, seek to impose any new obligation upon Mr. Trower. Mr. Trower would, supposing this condition to be imported, be under no greater obligation after it was imported than before; but Mr. Du Bedat would, no doubt, be in a position to say, "You cannot bind me to this arrangement unless Haggard's name be inserted in the prospectus." Well, if that be the true view, Mr. Du Bedat could undoubtedly waive that condition which he had introduced for his own protection. But even if it were to be regarded (and I have difficulty in seeing how it can) as a condition of the contract which Mr. Du Bedat alone could not waive, but which could only be dispensed with by consent of both parties, I am utterly unable to see why it cannot be dispensed with if both parties assent to the substitution of some other name for that of Haggard.

Now, my Lords, what happened was this:—There was some delay in completing the arrangements with Haggard. Mr. Trower became discontented because matters did not progress fast enough; and upon the 24th October he wrote to Mussons, saying that he had waited many weeks, in the expectation that something definite would be done, that he had withdrawn his business from Mr. Gunn's hands, and that he proposed to enter into a contract with a responsible London firm at once, and to launch his Company through them. He then added: "And as they will reserve the right of employing their own brokers, &c., I shall be compelled to withdraw my agreements with your firm, and also from your London and Dublin nominees." It appears that some little time after that Mr. Trower did break off with Haggard, on what terms does not appear, and that he did make an arrangement with the firm of Govett & Company to be the London brokers. Messrs. Govett & Company were brokers of, at least, as high standing as Messrs. Haggard, Hale, and Pixley. Indeed Mr. Du Bedat regarded them as a firm of brokers even more desirable than were Messrs. Haggard. His only object in introducing the condition, as is agreed on all hands, was that he did not like his name to appear on a prospectus where the London brokers belonged to the class of what

are described as mining brokers; but that provided they were stockbrokers of good standing, there was no reason why he should prefer Haggard's to any other firm; that he had no personal regard for Haggard, but had a desire to avoid the name of a mining broker, the conjunction of whose name with his own he thought might be undesirable. The arrangement made with Messrs. Govett did not necessitate, as Mr. Trower had anticipated that it might, the abandonment of the Liverpool and Dublin brokers whose names it had been contemplated down to that time to unite with that of the London brokers.

On the 4th November Mr. Herbert Fox wrote a letter to Mr. Du Bedat, enclosing the prospectus of the mine, in which he says "Messrs. Govett, Sons, and Company of the Stock Exchange are to be the London brokers instead of Haggard, Hale, and Pixley; and I am authorised by the vendor to ask you to act as broker in Dublin on the original terms, £1000 or guineas, and will be glad of a wire from you to-morrow saying you consent." We have not the reply which was sent in answer to that letter; but it is agreed on all hands, to this extent, at all events, that he gave his consent, which would be amply proved by what subsequently took place. Prospectuses were printed. On those prospectuses appeared the names of Govett, and Musson, and Du Bedat. A number of them were sent to Mr. Du Bedat and were not returned by him. No objection was taken to Messrs. Govett's name standing there instead of Messrs. Haggard's; on the contrary, they were circulated by him amongst his friends. The matter went on to allotment, and then when he applied for his 1000 guineas, or his representatives applied for the 1000 guineas, the only consideration for which was that he should allow his name to be used as broker, and the only condition to which was that the Company should go to allotment, he was told that nothing was due to him at all, because there was no contract with him, inasmuch as it was made a condition that Messrs. Haggard should be the brokers, and that it did not matter that he took no exception to the substitution of Govett's name for Haggard's, or even gave his assent to it; that his only right could be under some implied contract and not under the contract which was originally made. My, Lords, with the greatest possible respect to the learned Judges who have taken this

H. L. 1893.

MACONCHY v. TROWER.

Lord Herschell, C.

view in the Court below, it is one to which I am unable to give my assent for a moment. It appears to me that even assuming that there was this condition that Messrs. Haggard were to be the brokers, when another firm of brokers was substituted, and that was brought to the knowledge of Mr. Du Bedat, and he did not take exception to that substitution, but permitted his name still to be used on the prospectus, and when his name was still used on the prospectus, it is impossible to say that that was not done under the original contract with, if necessary, an agreed substitution by the parties of the name of Govett for the name of Haggard.

My Lords, as I understand the argument against that view, it is that Mr. Trower did not think that this was being done under the old contract, inasmuch as he had entered into a different arrangement with Messrs. Musson, namely, that they were not to be paid 1000 guineas, but to be paid by results, and that he thought that his agent had entered into a similar arrangement with Mr. Du Bedat. Well, his agent had not made a similar arrangement with Mr. Du Bedat. But, then he says, as regards Mr. Du Bedat, that he thought he was agreeing to have Govett's name substituted for Haggard's under a new contract. It is quite true that he was wrong in that, because what he supposed to be a new contract was not a new contract at all, inasmuch as Mr. Fox had no authority to enter into a new contract. But Mr. Trower, erroneously thinking that he was doing all this, not under the original contract but under a new contract, with a different price to be paid, which he was not—because Mr. Fox had no power to enter into a new contract—it is said that therefore Mr. Du Bedat cannot now claim under the original contract, varied only by the condition that Govett is to be substituted for Haggard. My Lords, I cannot think that that is a correct view of the law. It seems to me that, looked at as a matter of business, the result would be an extremely unreasonable one. In matters of this description, no doubt, where rigid rules of law bind, it would be wrong to depart from them in any way, merely because the application of them is supposed to work hardship upon one party or the other; but where there are no such rigid rules it seems to me that we ought, as far as possible, to endeavour to construe the documents which pass, or the transactions which are effected, between business men in a spirit of common sense, in a business spirit; and inasmuch as I can find

nothing to bring home to Mr. Du Bedat's mind that he was continuing to allow his name to be used in the prospectus under circumstances in any way changed except in this respect, that he was assenting to the substitution of Govett's name for Haggard's it seems to me that it would be wrong, on account of anything which Mr. Trower thought, but which he had not brought home to the mind of Mr. Du Bedat, to hold that Mr. Du Bedat was disentitled to recover the sum agreed to be paid on the original contract when it cannot be disputed that he had fulfilled the consideration in respect of which it had at one time been agreed that the payment should be made.

My Lords, the only question which remains is whether there was evidence of rescission. On the matters with which I have hitherto been dealing no question was submitted to the jury, but it was left to the jury to say whether the contract, supposing it to be contained in the two documents exchanged between the parties, had been rescinded by mutual consent. Now, of course, the matter depends on whether both parties, being of that mind, had agreed to rescind. The jury have found that the contract was so rescinded; but with all respect to those who have taken a different view, I am unable to see the slightest evidence of rescission. I agree in this matter with the learned Judges in the Queen's Bench Division, one of whom, Mr. Justice Holmes, said that there was not even a scintilla of evidence, which used at one time to be thought for certain purposes sufficient. What is the evidence of rescission that is suggested? How does the evidence stand? Mr. Du Bedat is examined on commission. He says he never did rescind. I do not find that any suggestion is made to him in cross-examination of anything he had ever said or anything he had ever done, or anything he had ever written, which would amount to a rescission or amount to an indication that he had been of a mind to rescind. And when one asked the learned counsel to point specifically to what were the facts which they said established rescission, their answer consisted rather in the suggestion of what might possibly have been the case than of facts which were proved in evidence. It is said that it is a fair inference that Du Bedat knew prior to the 4th November that Haggards were not willing to act as brokers, or, at all events, that Trower was not willing to

H. L. 1893. MACONCHY v. TROWER. Lord Herschell, C.

employ them. I think that was very likely the case; but I think this is certain, that if Du Bedat knew that, he knew at the same time that it was in contemplation to substitute for them other brokers whom he regarded as even superior to Haggard. Now, under those circumstances, when one is asked to infer rescission without any direct proof, because we were told by Mr. Atkinson truly that sometimes a thing may be proved by circumstantial evidence without any direct evidence, I say, when we are asked to infer rescission from the circumstances, surely the probabilities are to be considered, and often they are of very great importance. Now, what are the circumstances? Why should Mr. Du Bedat be disposed to rescind this contract? As far as I can see, he had nothing to gain by the rescission of it, and, possibly, a good deal to lose. Under those circumstances a business man generally does not rescind. If he rescinds, it is generally because he thinks he is going to get something by it, and sometimes he rescinds in order to get more than he ought to get. But why a business man should rescind a beneficial contract when he is to get no advantage by rescinding it, it is difficult to see. Was not that Mr. Du Bedat's position? I take, of course, the assumption of the defendant in this case. His assumption is that Mr. Du Bedat's position at the end of October or the beginning of November was this, that if the prospectus came out without Haggard's name in it he could at any time say "I am no longer bound; you are no longer entitled to the use of my name against my will"—that, having that full protection so that he could have prevented the use of his name if Haggard's name was not there, unless a name equally or more acceptable was there, he rescinded the contract and disentitled himself to receive £1000 for the use of his name, even if there were conjoined with it a name preferable to Haggard's. It seems to me that that need only be stated for the purpose of showing that it is inconceivable that a man in his senses (and it is not suggested that Mr. Du Bedat was not a shrewd business man, whatever his frailties may have been), should have consented to any such rescission.

Therefore all the probabilities are against rescission. Now, what is the evidence of it? Really, the evidence is chiefly derived from the language which somebody else uses in writing a letter

to Mr. Du Bedat. It is said that the letter which Mr. Fox wrote to him on the 4th November is inconsistent with the idea—an idea in Fox's mind, you will observe—that at that time there was a contract which Du Bedat could take advantage of. Why, with all respect, it should be thought that because one person writes to another in terms indicating that he does not think there is a contract, you should draw any sort of inference in favour of the view that the person receiving it has the same idea, I confess it is difficult for me to see. No doubt when a letter of that sort is written an inference may be drawn from the way in which it is dealt with in the answer. But in this case we have not the answer, whether by telegram or by letter. We know that it was an assent, but it may have been nothing more than that he assented to take the 1000 guineas, although Govett's name was substituted for Haggard's. There are certainly no terms in any document indicating that anything else was in his mind. He receiving a letter of this sort, believing that there was a contract, and having no objection to the substitution of Govett for Haggard, I really have a difficulty in seeing why it should be thought that Du Bedat must have written anything to repudiate the supposed notion to be derived from Fox's letter as to his ideas on the subject of the contract. I do not myself think, looking at the language used, that it would necessarily convey to the person receiving that letter the idea (although I admit that when you come to examine the words you may find it there) that there was no contract existing at that time, and that it was the initiation of a new contract altogether. It looks to me rather like the letter of a person referring to the original contract in its original terms, not having that contract before him, but intending only to suggest a single alteration. My Lords, beyond that I can see no reason whatever for suggesting that there was a rescission. I have thought it right to dwell upon this matter at some length out of respect for the learned Judges in the Court below, who have adopted a different view; otherwise I should have contented myself with saying that, having studied every word of the evidence in this case, I do not see a shadow of a rescission by agreement of this contract between the parties.

My Lords, I think I have now dealt with all the points which

H. L. 1893. MACONCHY *v.* TROWER.

were dealt with in the Court below. I entirely agree with the judgment of the Queen's Bench Division, with the very full and able judgment of Mr. Justice Holmes in particular, and I move, your Lordships, that the judgment appealed from be reversed, and that the judgment of the Queen's Bench Division be restored, the respondent to pay the costs in the Court below and of the appeal to this House.

LORD HALSBURY:—

My Lords, I am entirely of the same opinion. The question which stands at the front of this discussion, of course, is the existence or non-existence of a contract, and what that contract, if it existed, was.

My Lords, I confess that I should regard with something like terror the introduction into our jurisprudence of such a principle as is, I think, involved in the argument that the covering letter of a formal contract can ever be used for the purpose of altering or adding to its terms. In this case a formal contract is enclosed in a letter, it is signed by both the parties to it, and purports upon the face of it to be a formal contract. It is sought to add to the terms of that contract by the covering letter written to the agent. My Lords, I think that that would introduce a degree of uncertainty in the administration of the law which would be destructive to business. Every bought and sold note, every document, however formally drawn up—because it is to be observed that when both these two documents are placed together they are very much in the same position as if the parties had signed one document—every document which purports to be a contract, might be open to the argument that the letter which contained it, and which was written by an agent, was itself to form some part of the contract, although the contracting parties had not put their names to it, and although apparently upon the face of the instrument they had excluded every other term except those to which they had put their signatures as being part of the contract between them.

My Lords, under these circumstances, I confess that I am very glad that all your Lordships, I believe, are of opinion that it is impossible to treat these two documents otherwise than as the

contract between the parties. In truth, if one comes to that conclusion, there is no more left in the case except the question of rescission, because, upon the argument which follows, it is assumed as a necessary part of the reasoning that there was another condition imported into the contract. I do not disagree with anything which has fallen from the Lord Chancellor with reference to what would be the case if that condition was imported. It appears to me that upon the most familiar principles a condition inserted for the benefit of one person may be waived by that person and, nevertheless, the original contract continue in full force. But I confess that I hesitate myself to deal very seriously with that part of the question, because I am very firmly of opinion that the contract was such as is contained in those two letters signed by the two parties, and that by that contract the rights of the parties must be determined.

Lord Halsbury

My Lords, upon the question of rescission I also am of opinion that there was not one fragment of evidence to go to the jury upon the subject. The rescission—it is familiar law—must itself be by the agreement of both parties. Now, first of all, is there any direct evidence of rescission? The rescission, if it took place must either have been by letter or by verbal communication. The suggested verbal communication here was between Mr. Fox on the one side and Mr. Du Bedat on the other. Now, upon the subject of verbal communication Mr. Fox has been examined, and Mr. Du Bedat has been examined. It is admitted that neither of them admits for one single moment that any word passed between them upon which the learned counsel can fix and say, "This was evidence of an agreement, by Mr. Du Bedat at all events, that the contract should be rescinded." They both deny it, and under the pressure of those circumstances the learned counsel, not unnaturally, says, "Well, but Mr. Fox is not a person upon whom reliance can very well be placed; he is a person who wanted to get some money for himself; his brother was to get £200 under this arrangement: therefore he is rather disposed to juggle with the truth." I am not prepared to assent even to that view even if it would establish the proposition; but, after all, the utmost that can be done by it is to get rid of the value of Mr. Fox's testimony. Because it is a negative you cannot make affirmative proof out of

H. L. 1893.

MACONCHY v. TROWER.

Lord Halsbury

it. And when I look at the private communications passing between these two persons at a time when this question had not arisen—I mean had not arisen in the shape in which it afterwards arose—I find this, that Mr. Du Bedat had at all events applied for his fee. His view of what he was entitled to was very clear. Now, what did Mr. Fox write to Mr. Trower? "With regard to Mr. Du Bedat's fee, he never left the amount dependent on results, as you say in your letter. He holds your letter, promising 1000 guineas on allotment, and he has written to say he has not received it. I also showed you his letter declining to act for less than 1000 guineas, as he had never done so. So, under the circumstances, you must either send him a cheque, or write him, explaining how little support you received from Ireland, and asking to name a smaller fee." That letter is written on the 26th December. But this Mr. Fox is the very man who is relied upon as the man who made the agreement for rescission by word of mouth. My Lords, looking to the circumstances under which that letter was written, and the contents of that letter, it is really almost ludicrous to suggest that anything could have passed by word of mouth between Mr. Fox and Mr. Du Bedat at that time, when they were corresponding privately with one another, which amounted to anything like an agreement to rescind.

But, then, the learned counsel, being driven from direct evidence—and I must say they were in a very difficult position, because they had to prove an affirmative plea without a particle of evidence to support it—the learned counsel, being in that position, say, "Well, we are not bound to give direct evidence of rescission"—in that I agree—"but we may prove rescission by circumstantial evidence." Yes, but then you must have your circumstances, and I thought one of the conditions of proving anything by circumstantial evidence was that you must exclude every possible hypothesis except the one particular proposition which you seek to establish.

Now, what is there here even in that direction? It can hardly be denied that Mr. Du Bedat's conduct all through this transaction was at all events reconcilable with his being under the impression that he was acting under the original contract. The notion of its being necessary for him to answer the letter written

to him on the 4th November, and that he did not answer it (which is not true, because he did answer it), and the notion as to the circumstances under which he answered, and the form in which he answered, which the learned counsel puts forward to establish his proposition, are immediately met by this, that we do not know what Mr. Du Bedat did answer. I will assume it is established that he did telegraph; I will assume that it is established that he did write: but what he telegraphed and what he wrote is not in evidence, and, with all respect to the learned Chief Baron, he seems to assume that as established, and as being evidence of rescission, when, as a matter of fact, those persons who received the telegram or letter, which, either from neglect or for any other reason, is not before the Court, are the persons who are now insisting that there has been rescission.

My Lords, it appears that under these circumstances we are remitted to the only other evidence in the case, namely, the written documents. I must do the learned counsel who argued the case the justice to say that, except for the inference derived from the absence of a reply, and the sort of vague general proposition that there must have been a rescission, otherwise this could not have happened, they have not ventured to argue that the letters themselves constituted evidence of rescission. Indeed one of the difficulties which the learned counsel were in was that when they were asked what was the rescission they admitted that there was no direct rescission; and when the learned counsel was challenged with the fact that he never put anything in cross-examination to Mr. Du Bedat as that which showed rescission, he candidly said that he did not know what to suggest to him—that it was beyond his knowledge. I agree that it is true that if there was no rescission he would not know it; but then his misfortune was that it lay upon him to establish it, and if there was no evidence he could not establish it.

My Lords, it appears to me that it is impossible to suggest that there was evidence to go to the jury. Reluctant, as I always am, to interfere with the verdict which a jury has found, it must be subject to this, that there is evidence upon which a jury can reasonably find a verdict. I need not even add the qualification "reasonably" in this case, because I am deliberately

H. L. 1893.

MACONCHY v. TROWER.

Lord Halsbury

of opinion, after having looked carefully through the whole of the evidence in the case, that there is not a particle of evidence which ought to have been submitted to the jury; and I can only express my regret that the learned Chief Justice did not refuse to leave the question of rescission to the jury, because I am of opinion that if he had done so the litigation which followed might not have taken place at all. At all events, my Lords, I am of opinion that there was no evidence whatever of rescission to go to the jury, and that in the hypothetical case of there having been a new contract—and I put it deliberately as a hypothetical case, because I do not believe there is any such state of things—there was the amplest possible evidence of the waiver of the condition which it is alleged was made. Under the circumstances I entirely assent to the motion, proposed by the Lord Chancellor, that the judgment appealed from should be reversed.

LORD ASHBOURNE:—

My Lords, I concur.

I think that the agreement between Du Bedat and the respondent was contained in the two letters of October. I cannot regard the covering letter of 11th October, 1890, as introducing any new condition. That letter commenced, as was pointed out by my noble and learned friend opposite (Lord Morris) with the words, "I return Mr. Trower's letter duly signed," and then added, as between Fox and himself, his understanding that Mr. Haggard was to be a broker, a matter of interest no doubt to Du Bedat, but which he could readily waive, if even it had been made a condition.

I am unable to see any evidence of rescission. It is suggested that there was a contract or rescission because the contract of October was abandoned and a new contract substituted. I can see no evidence that Du Bedat ever agreed to abandon his contract or to establish in its place any new agreement. We are asked to infer this from the tone of Fox's letter to Du Bedat of November 4th, 1890. But this would not be the only or the legitimate inference from that letter, and it has been well said by Mr. Justice Holmes that there is an essential distinction "between evidence that leads

to inference and evidence from which nothing can spring but surmise or conjecture." Mr. Fox's letter of 26th December, 1890, is entirely opposed to the idea of rescission. I merely wish to add that I do not regard Mr. Trower's letters to the official assignee as at all satisfactory.

LORDS MACNAGHTON, MORRIS, and BOWEN, concurred.

The Attorney-General for Ireland :—

My Lords, perhaps I ought to ascertain whether any further order ought to be made as to repayment of costs. I do not know whether that will be necessary or not. The Court of Appeal imposed it as a condition upon us that we should pay the costs, which amounted to about £500, personally to the solicitor for the defendant; and they reserved the question of whether that money should be returned or not until your Lordships' House should have considered the case. I do not know whether I ought not to ask that it should be part of your Lordships' order not only that we should get our costs, but that this money which we have paid should be returned to us.

THE LORD CHANCELLOR :—

It always follows, as a matter of course, when costs are ordered by this House to be paid, that if any money has been paid by the other party in respect of those costs that money should be returned.

Solicitors for the appellants: *Clay & Close.*

Solicitors for the respondents: *Linklater, Hackwood, Addison,* and *Brown.*

Q. B. Div.
1894.
Jan. 30.

HARBISON *v.* M'LARNON (1).

(1894. No. 802.)

Practice—Writ of summons—Irregularity—Excessive claim for costs—Setting aside.

The Court will give a defendant his costs of a motion to set aside a writ indorsed with a claim for costs exceeding the amount allowed by Order III., Rule 7.

MOTION to set aside a writ of summons. The writ was specially endorsed with a claim for £19 1*s.* 3*d.*, and "£2 10*s.* for costs."

W. H. Brown, for the defendant:—

The defendant should get his costs of this application; otherwise excessive costs could be extorted with impunity in any case where the defendant pays the debt after service of the writ without consulting a solicitor: *Jacobs* v. *Monck* (2); *Roberts* v. *Casey* (3).

Wylie, for the plaintiff:—

Jacobs v. *Monck* (2) was an action under the Summary Procedure on Bills of Exchange (Ireland) Act, 1861, under which the defendant had in any case to come into Court. In *Roberts* v. *Casey* (3) the plaintiff's attention was called to the irregularity, and he was required either to amend or discontinue, but he refused. In this case the notice of motion was served without asking the plaintiff to amend.

Brown, in reply.

O'BRIEN, J.:—

We consider that, on the whole, it is desirable to maintain the only sanction for the rule which would remain where the

(1) Before O'BRIEN, HOLMES, GIBSON, and MADDEN, JJ.

(2) 12 L. R. Ir. 373.

(3) 22 Ir. L. T. R. 8.

defendant desires to pay the debt without defending, namely, the liability to pay the defendant's costs of a motion to set aside the writ. We will give the plaintiff leave to amend the writ, but he must pay the defendant three guineas costs of this motion.

Solicitor for the plaintiff: *Thomas J. S. Harrison.*
Solicitor for the defendant: *John Malone.*

G. G.

THE NATIONAL BANK (LIMITED) *v.* CULLEN (1).

Appeal. 1894. Feb. 16.

Practice—Leave to issue execution—Judgment more than six years old—Order XLII., Rules 24 and 25—Application ex parte.

Leave will not be given, in the absence of special circumstances, to issue execution on a judgment more than six years old, without notice to the party liable.

ON the 26th November, 1885, the plaintiffs recovered a judgment against the defendant for £85 15*s.*, and £5 16*s* costs, making together £91 11*s*. The plaintiffs did not issue execution because the defendant had not any goods or chattels which could be seized.

On the 8th Dec., 1893, an application was made to Gibson, J., *ex parte* for leave to issue execution, which was refused, and the plaintiffs, on the 12th January, 1894, appealed to the Court of Appeal from that order, and the appeal was refused, on the ground that the affidavit on which the motion was grounded contained no explanation of the delay.

On the 6th February, 1894, a second application was made to the Queen's Bench, grounded on the affidavit of John Chamney, the manager of the branch of the plaintiff's Bank at Portarlington, in which he stated that the sum of £91 11*s.* was still due, and £29 9*s.* 4*d.* for interest on the judgment, and that there had been no change of parties since the date of the judgment. He also stated that he had recently ascertained that the defendant was in possession of a

(1) Before WALKER, C., PALLES, C.B., and FITZGIBBON and BARRY, L.JJ.

Appeal. 1894. NAT. BANK v. CULLEN.

large amount of chattel property, consisting of farming stock, and furniture, and that, from his own knowledge, he believed that if the defendant had notice that a seizure of his goods by the sheriff was about to take place he would take steps at once to place his goods out of the reach of the sheriff.

The application was refused by Gibson, J., and from that order the plaintiffs appealed.

Herbert Wilson, in support of the appeal:—

I submit that the application should be granted for two reasons. First, because it is the practice in England to grant these applications *ex parte* before a Master, and it is not necessary to show any special circumstances: Annual Practice, 794. I admit that before the Judicature Act it would have been necessary to show special circumstances on an application *ex parte* to enter a suggestion on the record. Secondly, because there are special circumstances in this case, which should induce the Court to make the order without notice to the defendant, namely, it is in evidence that if the defendant gets notice of this application he will make away with his goods.

WALKER, C.:—

We do not feel justified in interfering with the order of Gibson, J., in this case. We have already decided on the motion of Mr. Wilson, of the 12th January, that on the facts before us we should not be justified in making the order on an *ex parte* application. His affidavit then stated no special reason for the delay of eight years, and the question now is—Has Mr. Wilson brought himself within the rule that he is entitled to issue execution without notice to the defendant? All that is alleged is that he has ascertained that the defendant has now got chattels available to satisfy the judgment. In other words, that he has goods now, and that the defendant would, if he received notice, place his goods out of reach of the sheriff. There may be, in many cases, circumstances which would enable, or authorise, a judge to make the order after six years have elapsed, as, for example, if the defendant was making away with his goods, or was calling an auction; but in this case the object seems to be to

enable the plaintiffs to put in an execution before the defendant can exercise ownership over the property.

The words of the Rule seem to suggest that there should be some notice given. The words of Order XLII., Rule 25, are :— "The party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution." "And such Court or Judge may . . . . . make an order to that effect." I think that implies something more than the existence of a judgment. *Ex hypothesi* the judgment must exist. The Rule then goes on—"Or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried." It seems plain from this that on an application made to the Judge, the issue could not be put in form without having the other side present.

Under all the circumstances, we think that the practice which has been established by Gibson, J., and by the practice of the Court of Exchequer, is correct, and that except in a special case, after the lapse of so long a time from the date of the judgment, there ought to be notice given for leave to issue execution.

PALLES, C. B. :—

Rules 24 and 25 of Order XLII. are substantially similar to sections 148 and 149 of the Common Law Procedure Act of 1853 (16 & 17 Vict. c. 113), and thus the practice governed thereby has been in force for forty years. There is no report of any case decided during that period in which an order such as is here sought was, under similar circumstances, made without notice. I am personally aware that it was the uniform practice of the former Court of Exchequer, and, since the Judicature Act, of the Exchequer Division, to require notice in such a case; and as this is the second appeal in the present case from the Queen's Bench Division, I assume that the order appealed from represents the practice which prevails there. These circumstances in themselves afford an answer to the present appeal.

I, however, go further. I hold the existing practice to be correct in principle. The cases in which, under Rule 25, it is necessary to apply to the Court for leave to issue execution may

Appeal. 1894. NAT. BANK v. CULLEN. Palles, C.B.

be divided into four classes:—1, where there has been a change in the party entitled to issue the execution: for instance, where the plaintiff has died, has become bankrupt, or has assigned the judgment; 2, where there has been a change in the person against whom execution is to issue, as, for instance, where, on a judgment against the public officer of a Company, execution is sought to be issued against an alleged shareholder; 3, where a party is entitled to execution upon a judgment of assets *in futuro*; and, 4, a case such as the present, where, although there has been no change of parties, upwards of six years have elapsed since the judgment.

In the second of these cases (save, perhaps, where it is against the administrator or executor by grant as distinguished from executor *de son tort* of the defendant) it would be contrary to natural justice to allow execution to issue without notice, because the order would decide that the goods of a party not theretofore before the Court were liable to the judgment without giving any person an opportunity of contesting matter which was not concluded by the judgment, and which was, for the first time, brought before the Court upon the application for execution. Nearly similar observations are applicable to the third case.

Upon the other hand, in cases within the first class, as the defendant would, *ex hypothesi*, have been liable to execution at the suit of the original party, had there not been a change of parties, it may be that if the title of the person seeking to issue execution clearly appeared, there would, in substance, be nothing to be contested by the defendant, and I can understand the order being made in such a case without notice.

The fourth case, within which is the present application, is intermediate between the second and third upon the one hand, and the first upon the other. It is where there has been a delay for upwards of six years. What is the principle upon which the General Orders in such a case require the leave of a Judge before issuing execution? This question admits of an easy answer. Section 148 of the Act of 1853 modified the common law rule as to the time within which execution should issue, and section 149 substituted, in cases within that modified rule, a summary application in lieu of the old writ of *scire facias*. At common law

execution could not issue, save in certain exceptional cases, later than a year and a day after the rendition of the judgment. Section 148 extended this period to six years. After this period of six years there was to be, under section 149, an application to the Court, in the same way as, under the Statute of Westminster the Second, after a year and a day, there should be a *scire facias*. The reason, therefore, for the leave of the Court being required is the same reason which, at common law, restricted the period for execution to a year and a day, and that reason is distinctly shown by Lord Denman in *Hiscocks* v. *Kemp* (1). The question in that case was whether, for the purpose of issuing execution upon a judgment after a year and a day, it was necessary to revive the judgment by *scire facias*, although the execution had been suspended by agreement of the parties. Lord Denman, in giving judgment, says:— "The *scire facias* in personal actions was given by that statute," *i.e.* that of Westminster the Second, "rather in aid of plaintiffs than in restraint of them. At the common law, a presumption arose, from the plaintiff's delay beyond a year, that his judgment either had been satisfied, or, from some supervening cause, ought not to be allowed to have its effect in execution. After such delay, therefore, he was not allowed to issue execution as a matter of course, but was driven to bring a new action on the judgment. The *scire facias*, which had been in use at the common law for the purpose of executing judgments in real actions after a year and a day's delay, was therefore adopted by the statute, as a less expensive and dilatory course for the plaintiff, and as *equally affording protection* to the *defendant*, if he had any reason to show why the execution should not issue."

Thus, the restriction upon the period for issuing execution was for the protection of the defendant, and in consequence of a presumption against the right to issue execution, arising from lapse of time; and if a period so short as a year and a day was, at common law, sufficient to raise such a presumption, so *a fortiori* must have been the extended period of six years during which, since 1853, execution can issue without leave.

It is said, however, that the affidavit here ought to be sufficient

(1) 3 Ad. & Ell. 676.

Appeal. 1894. NAT. BANK v. CULLEN. Palles, C.B.

to rebut that presumption. I am far from saying that there may not be special circumstances under which the order ought to be made without notice. There may be, for instance, a recent written acknowledgment of the debt; there may be an agreement suspending execution, a written application for time, or legal proceedings by the defendant, which terminated in favour of the plaintiff, but the pendency of which either prevented execution or rendered it prudent that it should not be executed. In the absence, however, of any special circumstances, if the case is one in which the common law provided notice to the defendant, *for his protection*, why, in the substituted statutable proceeding, should we, in the absence of special circumstances, say that the defendant does not require protection, and therefore dispense with notice? It is true there is an affidavit that the entire debt is due. I by no means discredit that affidavit; but I hold that the defendant is entitled to an opportunity of being heard before we judicially decide that it is true. This practice involves no substantial hardship upon the plaintiffs. If the case be one in which, during the entire of six years, it has been impossible to make an execution available, the plaintiff may, immediately after the lapse of that period, apply, on notice to the defendant, and obtain an order for liberty to issue execution, and this will remain in force for another period of six years.

I am of opinion that the order appealed from was right.

FITZ GIBBON, L.J.:—

In my note of this application, when first made on January 12, I find that Mr. Wilson said that it was made "to settle the practice," and that we affirmed the order of Gibson, J., "because there was nothing to show special circumstances." If the explanation of delay now given is sufficient, Mr. Wilson would, according to the English practice, be entitled to get the order, but he was not in that position when here before, because, according to that practice, an explanation of the delay should be given, and there was absolutely none on the former occasion.

Giving full effect to all that is now shown, a decision in Mr. Wilson's favour would settle it as the practice that the sheriff could be set in motion without any notice to the opposite party, after

any lapse of time, merely on the statement that the debt was still due, that the defendant was now possessed of goods, and that a bank manager believed him to be dishonest, without any explanation of delay, or any effort whatever to obtain payment without execution.

It appears to me that, as a general rule, it is a just and reasonable practice, under Ord. LII., Rule 3, that a party who has lapsed his time, and who requires the order of the Court, should let the other party know that he is applying for leave to issue execution. I say as a general rule, because special circumstances may be shown to justify the extreme step of sending down the sheriff without warning, and even without giving the debtor the chance of avoiding execution by payment or compromise. But here, during a period of eight years, the defendant had no means of paying the judgment. The Chief Baron has pointed out that though it was impossible to make the execution available during the six years, the plaintiff might have obtained liberty to issue execution, which would then have remained in force for a further period of six years. The only statement now is, that the defendant has at last got goods available to satisfy an execution, which he had not before: when or how he got them is not stated, but they are said to consist of farming stock and furniture. No fraudulent intention, no concealment or evasion, is proved, and we have only the belief of the bank manager that the debtor would make away with the goods if he received notice of this motion. If an affidavit in that form was held sufficient to prove "special circumstances," they would be proved in every case, because there are few bank managers who would find any difficulty in believing that their debtors would be likely to make away with their property if they got notice that the sheriff was to be put in motion. Would it be reasonable dealing between man and man to establish such a practice? The four days notice would not leave the debtor any less within the reach of the law than any ordinary defendant against whom judgment is entered. Proof of fraudulent removal of goods or the like might be given in special cases; but is it right to allow a creditor who had done nothing for eight years to march the sheriff suddenly into possession, without even writing a letter to ask for payment of the money? In this case

Appeal. 1894.

NAT. BANK v. CULLEN.

Fitz Gibbon, L.J.

there are absolutely no special circumstances. We have only the bare statement of the bank manager that the debtor has become possessed of property, and his belief, on unknown grounds, that he would make away with it if he got notice of the application.

While I agree that in most cases the special circumstances will be such as the Chief Baron has indicated, and will be circumstances establishing that the defendant could not show that it was unreasonable that execution should suddenly issue, I treat the matter as a question of practice; and I think the circumstances brought before us in this case are such as would equally exist in almost every case in which a bank had done nothing for years, because they thought that their debtor was not "worth powder and shot," and I hold that this is not enough to constitute "special circumstances."

BARRY, L.J.:—

I agree. I think the special grounds which appear on the face of the affidavit of the bank manager are not sufficient to bring the case within the rule.

I think it is inconvenient, when a case of this kind, involving the practice of two Divisions, is brought to this Court without being considered by the Divisional Court. The practice in the Exchequer Division, according to the lucid statement of the Lord Chief Baron, appears to be perfectly settled, that no such order has ever been made on such materials as appear in the present case. According to Mr. Wilson, there is some different practice adopted by some individual Judges in the Queen's Bench. I think he suggested that there was one Judge who would give the order as of course. It would therefore, I think, have been better had this case been brought before the Divisional Court, that the ten Judges who are entrusted with the practice of the Common Law Divisions should settle a practice, and this Court would be very slow to depart from a practice so settled. All I decide in this case is that I consider the facts proved here are insufficient to constitute any special circumstances. I should be slow in giving immediate execution to a plaintiff merely on his own statement that he expected that the defendant would make away with his property if he were served with notice of motion. Here

the only excuse of the plaintiffs for not obtaining an order for leave to issue execution immediately after the lapse of six years was that it would cost the bank some expense. If the bank did not like to incur the expense at the time, it is too strong to ask us, after the lapse of eight years, when the defendant has been lulled into a sense of security, to take him by surprise after he has come into some little property. I should not be a party to granting an order *ex parte* on such facts as have been brought before the Court in this case.

Appeal. 1894. NAT. BANK v. CULLEN. Barry, L.J.

Solicitor for the National Bank: *W. Dunne.*

R. D. M.

REG. (WEST CLARE RAILWAY CO., LIMITED) *v.* THE SECRETARY OF THE GRAND JURY FOR THE COUNTY OF CLARE (1).

Q. B. Div. 1893. June 23, 24, 30. *Appeal.* Nov. 28, 29.

Baronial guarantee—Amount to be paid by the baronies—Award of arbitrators —Certificate—Working expenses—46 & 47 *Vict. c.* 43, *s.* 6.

On an application for a writ of *certiorari* to bring up a certificate of arbitrators appointed under sect. 9 of the Tramways and Public Companies (Ireland) Act, 1883, finding that a sum should be contributed by the baronies to make up a deficiency in the guaranteed dividends, for the purpose of having such certificate quashed, the applicant showed that portion of the sum found by the arbitrators to be the working expenses consisted of sums which the applicant alleged represented interest or annual payments in respect of matters which the applicant contended should have been provided out of capital of the Company:—

Held, by the Court of Appeal (affirming the decision of the majority of the Queen's Bench Division), that the question whether these payments were working expenses was one of the matters upon which, by the Act of Parliament, jurisdiction was conferred upon the arbitrators to decide, and that their certificate in that respect was binding.

MOTION, on behalf of the West Clare Railway Co. (Limited), to make absolute a conditional order, dated the 24th April, 1893, for a writ of *mandamus*, directed to the secretary of the Grand

(1) In the Queen's Bench Division, before O'BRIEN, JOHNSON, GIBSON, and MADDEN, JJ.

Q. B. Div. 1893.

THE QUEEN v. CO. CLARE GRAND JURY.

Jury of Clare, commanding that he, the said secretary, do forthwith insert in the warrant for raising the moneys presented by the Grand Jury of the county of Clare at the Spring Assizes, 1893, the sum following, as if such sum had been duly presented by the said Grand Jury—that is to say, the sum of £125 together with the costs and expenses of levying the same, as and being the difference or balance which the said Grand Jury failed or omitted to present, between the sums constituting the sum of £2575 presented by the said Grand Jury and the sum of £2700, the amount duly ascertained and determined by the arbitrators appointed in that behalf, pursuant to the "Tramways and Public Companies (Ireland) Act, 1883," by their certificate dated the 7th February, 1893, to be paid to The West Clare Railway Co. (Limited), aforesaid, by the baronies of said county specified in the certificate, as the contribution towards the guaranteed dividend on the paid-up capital of the West Clare Railway Co., Limited, aforesaid, for the half-year ending the 31st October, 1892: And that he, the said secretary, acting as treasurer of the said county, do every act in the premises necessary to the due raising and levying of the sum so ascertained and determined by the said arbitrators, together with the costs and expenses of levying the same, or of so much of the said sums as the said Grand Jury have failed to present, together with the costs and expenses of levying the same, as if such sum had been duly presented by the said Grand Jury: Unless, &c.

CROSS-MOTION, by leave of the Court, on behalf of F. Morrice, secretary of the county Clare Grand Jury and a ratepayer of the guaranteeing area, for a writ of *certiorari* directed to the arbitrators appointed under the Tramways, &c. (Ireland), Act, 1883, and the West Clare Railway Order, 1884, to remove into the said Court a certificate of the said arbitrators, whereby it was certified that the sum of £2700 was payable and to be contributed by the guaranteeing area towards the guaranteed dividend on the paid-up capital of the West Clare Railway Co., Limited, for the half-year ending 31st October, 1892: the following being the statement of the grounds of the application, namely, that the said sum of £2700 included a certain sum, to wit, £125, composed of certain half-yearly payments which the West Clare Railway Co., Limited,

agreed to pay to the Athenry and Ennis Railway Co. for running powers over part of the Ennis Railway, and for rent of a plot of ground, and to the Waterford and Limerick Railway Co. for the use of Ennis Station, and by way of interest for moneys alleged to be expended by the Waterford and Limerick Railway Co. on works for accommodating the traffic of the West Clare Railway, which sum of £125 the said arbitrators, when making their said certificate, in order to ascertain and determine the net receipts of the West Clare Railway, deducted from the gross receipts of the said railway, as being (as the said arbitrators erroneously supposed) expenses of working the said railway, which deduction was in excess of the powers of the said arbitrators.

By the West Clare Railway Order, 1884, the West Clare Railway Co. was empowered to construct certain railways between Ennis and Miltown-Malbay, in the county of Clare, and amongst others a railway commencing at Ennis railway station and running parallel with the existing railways of the Athenry and Ennis junction railway and the Ennis branch of the Waterford and Limerick Railway Co., and alongside or upon these railways to a point 278 yards north from the bridge on the Athenry and Ennis junction railway, and to form a junction with the Athenry and Ennis junction railway at said point in the directions and levels with the powers of deviation (if any) specified and described in the deposited plan book of reference and sections, with all proper works and conveniences connected therewith, or for the purposes thereof, and (subject to the provisions of the Acts incorporated with the Order in statement) to purchase, acquire, and hold all such lands and easements as might be necessary for the purposes of the said railway, and the buildings and works necessary for working the said railway, and to lay down such additional rails and other appliances on the railways of the Waterford and Limerick Railway Co., and the Athenry and Ennis Railway Co., with their consent, as might be necessary for the purposes aforesaid.

By said Order (sect. 6) it was declared that the presentment of the Grand Jury of the county of Clare, therein set out, should be confirmed, including the charge to be defrayed by the several baronies, for the payment in perpetuity of dividends at the rate of

Q. B. Div. 1893.

THE QUEEN v. CO. CLARE GRAND JURY.

£4 per cent. per annum upon the paid-up capital of the Company, as fixed by said Order at the sum of £163,500; and that the several baronies, constituting the entire of the said county, should contribute in respect of said liability in the proportion which £70,000 bears to £170,000; and that the baronies of Ibrickane, Inchiquin, and Islands should, in addition to their proportion of said first-mentioned contribution, pay the residue of said liability, and the same baronies should be liable to provide for the completing, working, and maintaining of the said undertaking in the like proportions; and the capital, to which the guarantee for the said light railway set out in the said presentment for the said county should apply, was thereby limited to the sum of £163,500: provided that the guarantee should apply to so much of the capital so limited as should be, for the time being, actually paid up. Section 10 declared that the dividends upon the said capital of the said light railway should be paid half-yearly in perpetuity.

By section 38 the Company was authorized, subject to the approval of the Board of Trade, to enter into contracts and agreements, or arrangements with any other Company for working, use, interchange of traffic, management, and maintenance, or to acquire running powers, make junctions, lay down additional rails, and to carry into effect agreements in reference thereto, and the costs thereof.

This presentment of the Grand Jury of the county of Clare had been made at the Spring Assizes, 1884, guaranteeing dividends on the sum of £170,000, or such other sum, not exceeding that amount, as should be limited by the Lord Lieutenant in Council. An appeal being lodged against the confirmation of the said presentment, the amount of the said guarantee was reduced by Order in Council to the sum of £163,500.

In consequence of this appeal the said Order in Council required confirmation by Parliament, and accordingly a Bill for that purpose was introduced. While the Bill was pending in the House of Lords, the W. & L. Ry. Co. presented a petition, alleging that it was proposed to enter upon and prejudicially to interfere with their railway station and property, and to effect a most inconvenient junction with the A. & E. Railway, which was worked and managed by the W. & L. Ry. Co. This petition was

withdrawn upon an undertaking that there should be no prejudicial interference with the station and works of the W. & L. Ry. Co. The terms of this undertaking were then practically agreed to, and were substantially carried out, after protracted negotiations, in the agreement of the 27th June, 1888.

By indenture, dated the 3rd November, 1884, William M. Murphy contracted with the West Clare Company for the execution of the said railways, the material parts of the contract being to the following effect:—1. The contractor, in accordance with the deposited plans and sections, and with the specification annexed, to execute all works necessary to enable the line to be opened for traffic, and to provide the engines, carriages, and rolling stock, for the sum of £153,000, and for that purpose provide and supply all necessary plant, carriage, labour, materials, and appliances for the performance of the works, the said contract-price being based upon the stipulation that the Company shall obtain permission to use the existing Ennis Station, and to lay down additional rails on the existing railways of the Waterford and Limerick and Athenry and Ennis Railway Companies between Ennis and a point 278 yards, or thereabouts, north of the bridge on the Athenry and Ennis Railway, over the road from Ennis to Tulla, and form a junction with the Athenry and Ennis Railway at that point; and in case the sum of £10,500 shall not be sufficient to pay for the land, the contractor hereby undertakes to provide the difference. And in case the land shall be obtained by the Company for a lesser sum than £10,500, the contractor shall receive the difference in addition to the amount of his contract. 2. The Company to provide the land necessary for the purposes of the undertaking, and to pay the purchase-money and deliver to the contractor the possession thereof within six months from the date hereof, and also, within the time aforesaid, to obtain the necessary permission to use the existing railways of the Waterford and Limerick and Athenry and Ennis Railway Companies, and to lay down additional rails, and execute all necessary works thereon in accordance with the specification; and if the Company should fail to obtain such permission, and that it should, in consequence, be necessary to execute additional works to bring the said line, by an independent railway, from the intended point of junction to

Q. B. Div. 1893.

THE QUEEN v. CO. CLARE GRAND JURY.

Ennis, the sum to be paid by the Company to the contractor therefor to be determined by arbitration, failing agreement.

In the annexed specification it was specified that there were to be five stations, viz. Ennis, Corofin, Ennistymon, Lahinch, and Miltown, on the construction of which, including signals, platforms, &c. &c., a sum not exceeding £6000 was to be expended.

On the deposited plans and sections relating to that portion of the line between Ennis Station and the junction with the Athenry and Ennis Junction Railway, the line of rails is shown as intended to be laid down on the grounds of the Athenry Railway inside the fences; but the lands adjoining on the west side of the Athenry Railway were delineated as being within the limit of deviation, and the West Clare Company's powers of compulsory purchase extended over such adjoining lands.

The West Clare Railway Company made an ineffectual endeavour to purchase the lands of the Athenry Company delineated in the deposited plans, but were restrained by the Court of Chancery, when, instead of purchasing the adjoining lands, only about an acre of which would (it was alleged) have been required, they entered into an agreement with the Athenry Company to pay a perpetual yearly rent (which was fixed by arbitration at £51 annually) for the right of using the lands of the Athenry Company, thereby effecting a saving of about £750 in capital expenditure, which would have been necessary to execute the requisite cuttings and other works on the adjoining lands.

By agreement of the 1st February, 1888, the West Clare Company also contracted to pay to the Athenry Company a sum of £10 yearly for the permission to use a plot of land belonging to the Athenry Company in the vicinity of Ennis Station, instead of purchasing such right of user or purchasing other lands.

By articles of agreement, dated the 27th June, 1888, and made between the Waterford and Limerick Railway Company and the West Clare Company, it was agreed that for the use of the Station of the Waterford Company at Ennis (Article 13) the West Clare Company should from time to time pay to the Waterford Company the sum of £60 per annum for the user of the

existing station of the W. & L. Ry. Co. at Ennis, and accommodation, and £6 per cent. on all sums at any time expended by the Waterford Company on capital account in the enlargement, improvement, and alteration of the Ennis Station necessary for the purpose of accommodation and working the traffic of the West Clare Company, which sum, up to the date of this agreement, was ascertained to be £3000, and that such payments should for all purposes be and be deemed to be working expenses of the West Clare Railway Company.

The West Clare Railway was opened for traffic on the 2nd July, 1887.

The net receipts of the railway not being sufficient to pay the entire of the guaranteed dividend on the paid-up capital, as limited by the Order in Council, the Grand Jury of the county Clare made presentments from time to time, as provided by the said Order, for the deficiency (including the several matters now in controversy) (1), upon the certificate of the arbitrators, Sir John Ball Greene, Colonel James O'Hara, and John Hill, who had been appointed by the Board of Trade under the provisions of the Tramways, &c. (Ireland), Act, 1883, and the said Order.

By their certificate, dated the 7th February, 1893, the arbitrators ascertained that the gross receipts from the undertaking of the West Clare Railway for the half-year ending the 31st October, 1892, amounted to £5263 19*s.* 8*d.*; that the expenses of management, maintenance, and proper working of the undertaking for the same period amounted to £4461 14*s.*; that, after allowing for an unappropriated balance of £232 5*s.* 8*d.*, the net receipts of the undertaking for the same period, applicable to the payment of dividends at the guaranteed rate on the paid-up capital of the West Clare Company amounted to £570, showing a partial insufficiency in the half-year of such net receipts for payment of such dividends; and that the further sum of £2700, being the

(1) It was stated, in one of the affidavits that were filed in the case, that at the Summer Assizes, 1892, the Grand Jury sought to disallow the items now disputed; but, being advised by the going Judge of Assize (Lord Justice Barry) that the certificate of the arbitrators was final, a presentment was made for the full amount certified.

Q. B. Div. 1893.

THE QUEEN v. Co. CLARE GRAND JURY.

amount of such partial insufficiency, was payable and to be contributed towards the guaranteed dividend on the paid-up capital of the undertaking, under the said presentment and Order in Council.

At the Spring Assizes, 1893, the certificate of the arbitrators came before the Grand Jury, who refused to present for the full amount, but presented for the sum of £2575, being £125 less than the amount certified.

This sum of £125 (which had been treated by the arbitrators, in ascertaining the net receipts, as working expenses, and to be deducted therefore from the gross receipts) was made up as follows:—

A moiety of the sum of £180 (alleged to be due to the Waterford Company for interest at 6 per cent. on the sum of £3000 expended on works at Ennis Station), ...	£90	0	0
A moiety of the sum of £60 (alleged to be due to the Waterford Company for the use of Ennis Station, including the sum of £51 credited to the Athenry Company for the use of their part of the Junction Railway), ...	30	0	0
A moiety of the sum of £10 (alleged to be due to the Athenry Company for the use of a plot of land at Ennis Station), ...	5	0	0
	£125	0	0

The Grand Jury alleged that under the contract of November, 1884, which made provision in certain events for the payment of the contract-money by the issue of baronial guaranteed shares, the entire of said sum of £153,000 was paid to the said Mr. Wm. M. Murphy, and that he became and was a "predominating influence" in the West Clare Railway Co.; that all the works executed at Ennis Station by the W. & L. Ry. Co. were works necessary in order to enable the line to be opened for traffic, and as such were comprised in the said contract with W. M. Murphy; that W. M. Murphy executed no works at Ennis Station, although he had contracted to do so; that it was impossible that the sum of £6000 allocated to stations was expended on the other stations

along the line; that, notwithstanding, the West Clare Railway Company released W. M. Murphy from his contract to execute the works so executed by the W. & L. Railway Co., and agreed with the latter for the execution of same; that this agreement was *ultra vires* and illegal on the part of the W. & L. Ry. Co.; that there was no evidence of a sum of £3000 having been spent on the works executed at Ennis Station. Thus, the grounds of the refusal of the Grand Jury to present for the full sum certified, as was stated on the affidavits, were that it was the duty of the West Clare Railway Company and the contractor W. M. Murphy, to construct the said works, and to purchase the said lands, or rights over the same, in respect of which these annual payments of £250 were demanded, with the guaranteed capital moneys provided by the Grand Jury, and that there was no power to bind the Grand Jury by such contracts for the payment of fixed annual sums.

On the affidavits filed on behalf of the Company (which were made without prejudice to the right of the Company to rely on the finality of the certificate) it was stated that W. M. Murphy did not hold any guaranteed shares in the Company, and that the list of shareholders, made up to the 30th April, 1893, showed that the entire guaranteed capital of the Company was wholly in the hands of the public; that the works at the various stations, excluding Ennis, must have cost £6200; that the cost of the works executed by the W. & L. Railway Co. at Ennis Station amounted, on an independent estimate, to £2934; that the Company *bona fide* endeavoured to obtain all the lands necessary for the purpose of the undertaking; that under the final award of the arbitrator, dated the 18th October, 1886, they attempted to enter upon the lands of the A. & E. Railway Co.; that the latter instituted an action in the Chancery Division to restrain them from entering upon or taking any portion of, or interfering with, the railway or lands of the A. & E. Railway Co.; that, on the advice of counsel, this action was compromised by consent, upon terms afterwards embodied in the agreement of the 1st February, 1888; that such payments as those now questioned for the use of ground and stations were usually treated as working expenses, and that the sums so payable by the West Clare Railway Co. were moderate in amount.

Q. B. Div. 1893.

THE QUEEN v. Co. CLARE GRAND JURY.

D. B. Sullivan, Q.C., Seymour Bushe, Q.C., and *D. M'Carthy Mahony*, for the West Clare Railway Co.

The Right Hon. J. Atkinson, Q.C., G. Wright, Q.C., and *J. F. Vesey Fitzgerald*, for the secretary of the Grand Jury of the county Clare.

Cur. adv. vult.

June 30.

O'BRIEN, J. (1) :—

I cannot undertake to say in what way the financial results of what has happened in this case will ultimately work out, or, if the shareholders have an absolute right to 4 per cent. upon the capital, where they are to look for the deficiency, if any. But I cannot come to the conclusion that the guarantee of the Order gives them any right, as against the baronies, to look for it in any mode but that provided for by the statute, and by means of a presentment of the amount regulated by the statute. The Order and the general Act must be taken together, and under their combined effect the guarantee is, to pay the balance between 4 per cent. and the net receipts of the railway, ascertained in the mode specified, which it never can be suggested was not to be exclusive of the capital required for the making of the railway—the whole foundation of the benefit and burthen to the county.

One point appears to be overlooked, that, in the event of the railway earning more that a certain amount, the baronies would, in any other view of what are working expenses, be charged to a greater extent than was necessary to satisfy the 4 per cent. guarantee. The complaint is, that the arbitrators have taken the account upon a wholly wrong basis—that the effect is that they have made the baronies pay twice for the making of the line ; and the obvious difficulty of maintaining such a position led in the argument to the necessity of throwing the great weight of the contention upon the point that the decision of the arbitrators could not be re-opened on any ground whatever, whether of law or fact, of error in the certificate.

With respect to the cases of magistrates, on which so much stress was laid, and their right to determine questions of law and

(1) Mr. Justice O'Brien having to attend in the *Nisi Prius* Court, the judgments were delivered in this order.

fact without being subject to *certiorari*—all the arguments founded on such cases are, in my opinion, entirely off the road. Justices are a tribunal existing from the common law, and governed by the rules and principles of the common law. The summons, if within the law, constitutes the foundation of the jurisdiction, and, if the order be right, the interval between the two is filled up by the confidence which the law of necessity assigns to discretion concerning the evidence. If they are wrong, the remedy is by an appeal on a case stated. In this case there is no mode of questioning the proceedings of the arbitrators but by *certiorari*—an objection, certainly, that is of no force, if it can be collected to be the intention of the Legislature, from views of the subject they have to deal with, or reasons of policy, to vest in the body a right of judgment absolutely final and without power to challenge it in any way whatever. If it were the case of private arbitrators appointed by the parties, it may be conceded, without, however, determining the question, that that is the extent of the authority they possess at law, always supposing that they keep within the matter in difference.

But I do not think that the rules concerning arbitrators, any more than magistrates, furnish the real principle of decision in this matter. They are certainly not auditors, for auditors are otherwise provided for. They are called arbitrators, for the reason probably that there is another officer also appointed by the Board of Trade, for settling matters between Railway Companies and the public, who is called by the same name; but if any conclusion be drawn from the name as to their authority, it is, perhaps, met by the similar argument the other way, that their decision is not called an award, but a certificate. But the case is not left at all to the analogies of justices, or general principles of arbitration. There is a statute that lays down in precise lines what the arbitrators are to do; and it is within these lines that we must seek for the limit and scope of their authority; and there is but one point in which, as it occurs to me, we are required to travel out of them in search of a principle of construction. They are to ascertain the gross receipts, and, after deducting the working expenses, to arrive at the net receipts, which are to go in aid of the guarantee; and further, they are authorised to inquire into

Q. B. Div. 1893.

THE QUEEN v. Co. CLARE GRAND JURY.

O'Brien, J.

any matter which may be necessary for the purpose of ascertaining to what the amount is applicable.

This last clause without question covers the uncertain area within which any general principles can alone have any operation. Now, let us begin and see how the arbitrators proceed in the adjustment of that amount. First, the total receipts are laid before them; then the proposed deductions. They must certainly look to see what those deductions are. Then they see, of course, that the charges in question are money paid for the making of the railway, not the working of it. How is the case different, if it were not rent or interest, but capital sums? If it were proposed to pay £1000 to one Company or £3000 to the other, could these be working expenses? Are they the subjects at all with which the arbitrators have to deal? And can they make them the subject by saying they are? Suppose they were arbitrators in the ordinary sense, with the authority attributed to them by law, they could not decide that to be a matter in dispute which was not, in fact, in dispute. That is a matter that must be determined extrinsically. So these arbitrators could not make those working expenses which were not capable of being so in their own nature, by holding them to be working expenses. No one is bold enough to contend that they are working expenses which could have been intended to be charged in the account against the guaranteeing baronies. The passage that was read by Mr. Atkinson from the agreement with the Waterford and Limerick Railway Company, that the interest on the £3000 was to be considered a working expense, lets out, in a most simple manner, the perfect knowledge of the parties themselves of the blot in the business. The "working expenses" included, in fact, the making of a bridge which was in the deposited plans. If the arbitrators thought of the point at all, it is possible that they may have been misled by this clause without considering that such an endeavour to alter the character of the charge could not affect the guaranteeing baronies. Of course it is an important consideration, and of great consequence, whether the Legislature intended to give an absolute and uncontrolled authority to the arbitrators to fix the amount the baronies were to pay, and that, however wrong their proceedings, they could not be questioned. But such a construction is not consistent with

the ordinary duty of this Court, where a statutory authority is given to a certain person, to interfere if the limits of that authority be exceeded—a duty which I consider we have no more right to renounce than the right to *habeas corpus* as the law of personal liberty. The clause that the certificates are to be binding and conclusive lends no more effect than similar words have been allowed to possess in other cases, where such an authority is directly transgressed. "Binding and conclusive" means within the line laid down by law, but not outside it. I do not consider it necessary to enter into such a general question as whether those terms, or the policy, or the nature of the function assigned to the arbitrators, can be held to give them an immunity from correction, even if they make an undoubted mistake. These general questions, as it occurs to me, are outside the case. The statute has laid down what the appointed officers are to do; if they have done that, they are right, and if they have not, they are wrong. The point is, that they have taken into their hands what they have no concern with—that, having to measure off a certain portion of the receipts, they have added to them so as to alter the result; that they have turned capital into expenses, and put upon the baronies a charge which it is absolutely conceded they had no right to bear. In such a case I take it to be the certain law, not contradicted by any authority, and acted upon in the case of the Dublin presentment, and not denied, but assumed upon the hearing of the appeal, that this Court has the power, and is under a duty to interfere.

The point that appeared to me to present most difficulty was whether the arbitrators were bound to take things in the actual condition in which they found them, without going into their origin, and to regard them as working expenses, without which, in the existing state of things, the line could not be worked. But I cannot discern any principle upon which the fact that the use of the land and the stations for which the money is paid enters into the means of producing the revenue of the railway and cannot be detached from it, or upon which the consequences suggested of the county having to work the line itself, can be a ground for putting on the baronies a tax over and above the amount guaranteed by adding, in the form of rent or interest, to the guaranteed capital. Nor do

Q. B. Div. 1893.

THE QUEEN v. CO. CLARE GRAND JURY.

O'Brien, J.

I see how the position of shareholders, who are now in possession of shares, taken upon the faith of the guarantee in a railway assumed to have been made by means of capital, can have any right in equity to have the rent, substituted for capital that was to be used for the making of the railway, continued in extension of the terms of the guarantee. And further, I consider that the guaranteeing baronies are not called upon to enter on the very uncertain pursuit of some other remedy, requiring, if it exists, the adjustment of liabilities in which they have no concern, and which it cannot be suggested can have any other result as to them, instead of invoking the direct and simple action of this Court, in exercise of its accustomed authority, to restrain an illegal statutory act, and cut off their liability at the point where the statute cuts it off. They stand entirely apart from what may happen afterwards. But if the arbitrators were right in holding that these were working expenses, or if they have an absolute right to determine whether they were, it is in vain to suggest any other proceeding, to which, of necessity, the same answer would be a complete bar.

From these observations it will be collected that I am of opinion that *certiorari* applies to such a function as that of the arbitrators; that their proceeding was illegal; that the illegality was of such a nature that cannot be covered up under the assumption of an authority above control; and that, while it is possible to disentangle what is illegal from what is legal, the lawful and appropriate remedy is in the action of this Court, to prevent an unquestionable wrong—a wrong done to a portion of the public—a continuing wrong, that cannot be buried or hidden away, but will be rising up every half-year with the accusing persistence and obtrusiveness of an admitted injustice deprived of a remedy.

MADDEN, J.:—

This case raises important questions in relation to the power and duties of arbitrators under the 6th section of the Tramways Act of 1883. These arbitrators are appointed for the purpose of determining the amount of the half-yearly sums, if any, to be paid by the guaranteeing baronies. It is therefore necessary, in

the first instance, to consider the exact nature of the guarantee under which the liability of the baronies arises.

The guarantee to be given by the baronies is described in the 1st section of the Tramways Act, 1883, as one for "the payment of dividends not exceeding £5 per cent. upon so much of the share capital of the undertaking as is, for the time being, paid-up capital as defined by this Act." Following the terms of this section, the Grand Jury, by their presentment in this case, have guaranteed absolutely a dividend at the rate of £4 per cent. in perpetuity upon the paid-up share-capital of the Company. The Provisional Order, confirmed by Act of Parliament, embodies and adopts the presentment, and limits the amount of guaranteed capital to £163,500.

Thus, the obligation incurred by the baronies is an absolute statutory guarantee for payment in perpetuity of £4 per cent. on this sum, unconditioned (so far as the guarantee itself is concerned) by any reference to the earnings of the Company. It is not expressed to be a guarantee for payment of the deficiency of net earnings, to be ascertained upon the taking of a prescribed account.

Turning from the guarantee to the statutable provisions for its enforcement, we find an elaborate machinery provided in ease of the localities, and for their protection. The guaranteed shareholder is compelled, in the first instance, to resort for payment of dividend to the net receipts of the line. It is only in the event of "a total failure or partial insufficiency in any half-year of such net receipts to pay such dividend" (sect. 4), that the sum necessary to make good the deficiency is levied off the baronies, and it is for this sum that the Grand Jury are empowered and required to present.

Under the 4th and 6th sections of the Act of 1883 the net receipts for the purpose of the guarantee are to be ascertained, in each half-year, by deducting from the gross receipts "the expenses of the management and working and proper maintenance of the tramway."

So far as book-keeping is concerned, the baronies are protected by the 35th and 36th clauses of the Order in Council, which provide for the keeping of "full, true, and distinct books of account," open to the inspection of representatives of the Grand

Q. B. Div. 1893.

THE QUEEN v. CO. CLARE GRAND JURY.

Madden, J.

Jury, of the Treasury, and of the arbitrator. The accounts so kept are to be audited once in each year by a person appointed for that purpose by the Grand Jury, and the result of the audit is to be furnished to the Treasury and to the Grand Jury.

But the ascertainment of the net receipts and the consequent liability of the baronies are not left to the result of this audit. These matters are committed to the final and conclusive determination of three persons, who are called arbitrators. Of these one is the county surveyor, who may be supposed to look after the interest of the locality; and two are selected by the Board of Trade, presumably independent persons specially conversant with matters of this kind. Their functions, as defined by sect. 6 of the Act of 1883, are to determine the gross receipts and net receipts, as prescribed by the Act; to inquire into and determine all other matters necessary in order to ascertain the amount which may be applicable out of the receipts of the undertaking to the payment of the guaranteed dividend; to determine finally the amount of deficiency to be paid by the guaranteeing baronies; and to embody the result in a certificate, which is to be "in all respects binding on the Grand Jury and the baronies and the county."

Two views of the duties of arbitrators under this section have been presented. The argument on the part of the ratepayers assumes that they are bound to go back to the original formation of the Company, to go behind the contracts and obligations which actually bind the Company, and to disallow, as working expenses, charges which, in their origin, ought to have been borne by capital. On the other hand, it is contended that the arbitrators are bound to take matters as they find them, and to allow in each half-year the actual expenses of working the undertaking, in the condition and subject to the obligations existing in fact at the date of their inquiry.

In the course of the argument difficulties were suggested in working out the absolute statutable guarantee, and, at the same time giving effect to the determination of the arbitrators.

Suppose the arbitrators were to disallow as working expenses, in any half-year, sums actually disbursed, on the ground that they ought to have been met out of capital. The certified net receipts might thus be largely in excess of the moneys actually available for dividend. How, in such a case, is the guarantee to be worked out?

How is its absolute statutory form to be reconciled with the provisions contained in the Act of Parliament for the purpose of ascertaining and levying the sums to be from time to time paid by the baronies under its obligation?

Again, how is one of these Light Railway Companies, with guaranteed stock, to meet future expenditure of a kind which, in the case of an ordinary Company, would be chargeable against capital, unless by raising the amount out of revenue? The statutable dedication of net receipts to payment of dividend deprives it of borrowing powers. The Company cannot increase the guaranteed share-capital, and it would be impossible to place any ordinary stock, so long as the baronial guarantee has to be enforced. It is not easy to see how a capital account could be opened in regard to expenditure incurred after the completion of the line.

These questions must be answered if and when they arise. But they are not without significance in considering the interpretation to be put on the words of the 4th section. It is to my mind plain that the whole machinery of the statute, as regards the guarantee, has been constructed on the assumption that the net receipts, as found by the certificate, will be represented by money actually available in cash in the coffers of the Company. It was contemplated that the sum certified by the arbitrators as "net receipts" should be not only legally but actually applicable to payment of the guaranteed dividend.

It is therefore, in my opinion, impossible to give to the terms of the 4th section any narrower meaning than that given to the words "working expenses" in the 4th section of the Railway Companies Act, 1867.

Before that Act a judgment creditor of a Railway Company could, under a *fi. fa.*, seize the rolling-stock and other goods of the Company, and thus put a stop to the working of the railway. The Act deprived the creditor of that power, and gave him in lieu thereof the power of obtaining a receiver, and, if necessary, a manager; and the 4th section provided for the application of the receipts of the line after due provision for its working expenses and other proper outgoings. In interpreting this section the Courts have always had regard to the object of the Act, which is (as pointed out by Kay, J., in

Q. B. Div. 1893.

THE QUEEN v. Co. CLARE GRAND JURY.

Madden, J.

Re Eastern and Midlands Railways Co. (1)) "to enable the Company to carry on its business notwithstanding the judgment creditor." On this principle, where a Railway Company sold its rolling-stock to a Waggon Company, and took it back from the Waggon Company upon the terms of paying for it by instalments, so calculated as to discharge the principal for which the rolling-stock had been sold, and interest, at a defined time, when the rolling-stock was again to become the property of the Railway Company, it was held by the Court of Appeal in England that the instalments were "working expenses" within the meaning of the 4th section of the Act of 1867: *In re Cornwall Minerals Railway Co.* (2). This decision was applied by the same Court when, by the Special Act of the Company, "gross receipts" were expressly charged with the dividends on a portion of the capital of the Company: *In re Eastern and Midlands Railway Co.* (1).

The true test appears to be, what payments are necessary or proper to be made, in each half-year, under the then circumstances of the Company, and having regard to its existing obligations, in order to enable the line to be worked? In the case before us the arbitrators find certain contracts in existence, by which the West Clare Railway Company is bound to make certain annual payments to another Railway Company for the use of the station at Ennis. Some of these payments take the form of rent. Another is calculated at the rate of 6 per cent. on moneys laid out in adapting that station to the use of the West Clare Railway Company. It is quite plain from the judgments of the Court of Appeal in *Re Eastern and Midlands Railway Co.* (1) that all these payments, however they originated, would be held to be "working expenses," which a receiver appointed under the Act of 1867 would be bound to pay. The case of *The Queen* v. *Treasurer County Cork* (3) is a decision of this Court, and is an express authority for applying the same principles to the 4th section of the Tramways Act of 1883.

It is strongly argued on behalf of the ratepayers that, whatever form these payments take, they cannot be working expenses, inasmuch as they represent payments which ought to have been

(1) 45 Ch. Div. at p. 379. (2) 48 L. T. (N. S.) 61. (3) 24 L. R. Ir. 415.

made out of capital; that the arbitrators were acting without jurisdiction in allowing capital charges under the head of working expenses; and that, inasmuch as they acted in excess of jurisdiction, their certificate can be, in whole or in part, quashed by this Court on *certiorari*.

In considering this argument, I will assume, in favour of the applicants, that the locality was originally entitled to get, as the consideration for the guarantee, a railway fully constructed and equipped by means of the capital of £163,500; that the cost of obtaining whatever land, easement, or permission might be required from the Athenry and Ennis Railway Company ought, as between the West Clare Company and the barony, to have been borne by the capital of the Company, and not thrown upon the guaranteeing baronies, as part of the costs of working the undertaking. This being granted, it would seem to me to follow that the sums payable under the agreements in question ought not originally to have been thrown upon the fund available for working expenses of the railway. It does not follow that they should not be now regarded, in each half-year, so long as they continue payable, as part of such working expenses, for the purpose of ascertaining the amount available towards payment of dividend on the guaranteed capital.

It was as a protection against illegalities of the kind alleged to have taken place in regard to this railway, that the baronies are represented on the board of directorate, and also by delegates empowered to attend and vote at the general meetings of the Company. If the board of directors were to persist, against the protest of the baronial director, in any illegality injuriously affecting the ratepayers, I see nothing to prevent their representative from at once bringing an action in the Chancery Division, naming as defendants the Company and the other directors, for the purpose of restraining by injunction the illegality complained of.

It may or may not be that the ratepayers represented by the baronial director are, in the present case, now without remedy. On that I express no opinion. But I cannot accept the proposition that, if the baronial director neglects his duty, and illegality of the kind alleged to have taken place in this case has actually been perpetrated through his acquiescence, it is within the powers

Q. B. Div. 1893. THE QUEEN v. Co. CLARE GRAND JURY. Madden, J.

and duties of the arbitrators to assume the functions of the Chancery Division (without, however, parties, pleading, evidence, or argument), and, under the guise of adjusting gross and net receipts in a given half-year, to rip up the original constitution of the Company, and to set aside contracts which have been acquiesced in and acted on for a number of years as regulating the working expenses of the undertaking.

For these reasons I am of opinion that the applicants have failed to show that the payments of which they complain are other than expenses of the working and management of the line, within the meaning of the Act of 1883, and properly allowed as such by the arbitrators.

In this view of the case it is unnecessary to consider under what circumstances the decisions of the arbitrators can be questioned on *certiorari*. I will only say that, having read the short-hand writer's report of the judgments of the Court of Appeal in the case of the Blessington Tramway Co., I can find in them nothing conflicting with the decisions of this Court on *certiorari*, to which we have been referred, or affirming the proposition that a certificate of arbitrators acting within their jurisdiction, can be quashed on the ground of illegality or irregularity which does not appear upon its face. The Court of Appeal held that the certificate, if questioned at all, should be questioned on *certiorari*; but it was not necessary for the Court to define the classes of cases in which this remedy is available, nor did it purport to do so.

In my opinion the motion for *certiorari* should be refused, and the conditional order for a *mandamus* should be made absolute.

GIBSON, J.:—

The sum in controversy in this case, amounting to £125, is made up of the moiety of the following sums, namely, £51 per annum, paid as rent to the Athenry Railway; £9, moiety of certain headrent payable by the Athenry Company; £180 per annum, being interest at £6 per cent. on £3000 expended by the Waterford and Limerick Company at Ennis Station, for the purposes of the West Clare Company; and £10 rent for the use of a store. These items are impeached by the defendant, on the grounds that they largely represent matters in the undertaking

described in the Order of Council, which Murphy, as contractor, was bound, under his contract, to supply, and also that they represent capital expenditure which the Company ought to have provided for out of the authorized capital, and which, in any case, should have been met by setting apart a certain proportion of capital for that purpose. The Company, on the other hand, denying that the facts are as supposed by the defendants, contend 1, that *certiorari* does not lie to arbitrators; 2, that the arbitrators are absolute judges of what working expenses are; and 3, that the items in question are now at least working expenses; and, 4, that the arbitrators are to consider what are proper current expenses *de facto*, without embarking on a historico-legal investigation as to the origin and legality of items.

The very able discussion of the case by counsel at the Bar has brought into relief difficulties affecting the position of shareholders on the one hand, and of the guaranteeing county on the other, that had not previously presented themselves to me. If the arbitrators had disallowed the disputed items as illegal, the position of the guaranteed shareholders might have been prejudiced, as the expenses disallowed would have to be met somehow, and might have had to be paid by the shareholders responsible for the improper action of the Company, from whose corporate action they could not dissociate themselves. On the other hand, the plain policy and object of the statute demand that the certificate of the arbitrators, which is to be acted on forthwith, and which is to settle rights and liabilities for the half-year, should be, for the purpose of the county contribution, final, and not subject to the dilatory process of *certiorari* whenever there might happen to be a possible mistake of law as to an item.

I have no doubt that the capital of the Company cannot be enlarged by the colourable expedient of hiring agreements in such a way as to enhance the liability of the county under its guarantee. I am not prepared to assent to the argument that the final determination of a question so important, and in many cases so difficult, is left to the sole decision of a lay tribunal sitting as a board of arbitration. There is much to be said in favour of the view that a suit could have been brought to restrain the Company from entering into or acting upon such arrangements to the prejudice

Q. B. Div. 1893.

THE QUEEN v. CO. CLARE GRAND JURY.

Gibson, J.

of the guaranteeing county; and it may be, though I do not so decide, that the county may still be entitled to relief in a proper proceeding: *Attorney-General* v. *Barrett* (1).

Whether there was or is any such remedy, it is certain that *certiorari* is a most inconvenient mode of settling any such controversy, even assuming, without deciding, that the determination of working expenses was not, so far as regards the certificate, left by section 6 to the sole decision of the arbitrators, and also assuming that *certiorari* would lie if the arbitrators allowed as working expenses items which cannot legally be such. The items now in dispute might be and were *prima facie* proper working expenses; they proceed upon arrangements long since completed, and acted upon for years without effective objection, though the county, through its representatives, ought to have had full notice of the objections now urged. They were *prima facie* within the jurisdiction of the arbitrators, and *certiorari*, and resistance to *mandamus*, in respect of the certificate of arbitrators are not legitimate methods of raising the question of the original irregularity of the arrangements on which the impeached items depend. The arbitrators have not the machinery, and this Court has not the materials, for overhauling the legality of contracts forming for so long a period the basis of the traffic system of the Company. If the undertaking passed into the hands of the Grand Jury, under section 10 of the Act of 1883, the contracts which were not *prima facie ultra vires*, and which bind the Company, would, until invalidated by the judgment of a competent tribunal, affect the undertaking in the hands of the Grand Jury. Arbitrators must go upon the *prima facie* validity of items of expense, and cannot be expected to go back on and nullify bygone transactions and contracts on which the expenditure may be based. The machinery of the Act of 1883 requires that their decision, which covers the accounts of the half-year, should be prompt, and, as far as possible, final, at least for the purpose of the half-yearly contribution.

The county might have had, and may possibly still have, some means of getting relief, if the contracts and items now in question are, as argued, an undue enhancement of the liability under the guarantee. Whether this is so or not (and I express no final

(1) Ir. R. 3 Eq. 392.

opinion on the point), I am of opinion that *certiorari* must, on the case now presented, be refused, and that the *mandamus* on the part of the Company must be granted.

JOHNSON, J.:—

There are two motions before the Court to be disposed of. The one, a motion by the West Clare Railway Company to make absolute, notwithstanding cause shown, a conditional order for a *mandamus*, addressed to the secretary, acting as treasurer, of the Grand Jury of the county of Clare, commanding him to insert in the warrant for raising the moneys presented by the Grand Jury of the county of Clare at the last Spring Assizes, 1893, the sum of £125, with the costs and expenses of levying the same. The other, a motion, on behalf of the Grand Jury of the county of Clare, for a *certiorari* to bring up and quash the arbitrators' certificate, certifying that a sum of £2700 (which, in fact, includes this £125) is payable by the guaranteeing area towards the guaranteed dividend on the West Clare Railway Co. for the half-year ending 31st October, 1892.

The Court of Appeal, in their judgments in the unreported *Blessington Tramway Case* (1), appear to have laid it down that the certificate of arbitration under the Tramways Act, 1883, sect. 6, may be examinable by *certiorari*, and therefore the question is whether, in the circumstances of this case, *certiorari* is the proper course, and whether the arbitrators were within their jurisdiction in making this certificate. The certificate is not impeached for invalidity on the face of it; but it is contended that it is shown by affidavit that, in ascertaining and determining the figures appearing by the certificate as the sum payable for the half-year ending 31st October, 1892, on foot of the guarantee, the arbitrators have charged, as working expenses, against the gross profits of the line, the three annual sums so much debated and amounting to the sum of £125, which, it is said, ought, as against the guarantors, to have been provided for out of the guaranteed capital of £163,500, because the annual charge of these three sums was incurred in and about the completion of the line for traffic, in addition to the expenditure of the £163,500, and there-

(1) Since reported—32 L. R. Ir. 644.

Q. B. Div. 1893.

THE QUEEN v. Co. CLARE GRAND JURY.

Johnson, J.

fore that the charging of these annual sums to working expenses diminishes to that extent the net profits which are to go in aid of the guarantee; and thus the guaranteeing baronies are, in effect and indirectly, called on to pay or guarantee these sums, in addition to and beyond the sum which only they guaranteed, viz. £4 per cent. on £163,500. We are informed at the bar that the West Clare line was open for traffic in 1887, but the present objections are made to the half-yearly certificate for October, 1892. The Provisional Order, section 38, confers extensive powers on the Company, with the approval of the Board of Trade, to contract or arrange with other Companies for the purpose mentioned in that section; and I am not prepared to say that the arrangements for which the three annual sums in question are paid are not within the powers conferred on the Company by sect. 38. These annual sums are, in their nature, in my opinion, working expenses of the line, properly chargeable to revenue and not to capital, if it is for this Court to determine the question, which I think it is not. The question what, and what is not, properly chargeable to capital or revenue is often not easy of solution. Of this *Bloxam* v. *Metropolitan Railway Co.* (1) is an illustration; and as these matters are to be wound-up half-yearly, in order to assess the guarantee payable by the cesspayers for the time being (cesspayers being a constantly changing class), the Legislature considered it necessary to establish, not a statutable audit merely, but a statutable board of arbitration, especially competent to deal with these matters, and by whom these matters should be inquired into and ascertained and determined upon, and whose certificate should be in all respects binding on the Grand Jury, and the baronies, and the Company. Elaborate precautions are taken for safeguarding the interests of the guarantors. Provision is made by the Provisional Order, sections 35 and 36, for full accounts being kept by the Company, and produced for the inspection of such person or persons as the Grand Jury may from time to time appoint to examine them, and also of such person or persons as the Treasury may appoint for like purposes, and also of the arbitrators, and for the yearly audit of the accounts at the expense of the Company by a person appointed by the Grand Jury, and for the furnishing to

(1) L. R. 3 Ch. App. 337.

the Treasury and to the secretary of the Grand Jury of the result of the audit. By sect. 16 the county at large is to appoint annually a director, and four specified baronies are to appoint two directors, so that there shall always be three baronial directors (whose payment is also provided for: sect. 14) on the board of directors of the Company. In addition to this, by sect. 11, each of eleven specified baronies is to appoint a delegate, having five votes, to attend the general meetings of the Company; and, having thus provided carefully for the protection of the interests of the ratepayers, the Legislature established this statutable board of arbitration to inquire into and ascertain and determine upon the outgoings and incomings of the Company, including the working expenses; to ascertain and determine the amount of the gross and net receipts of the Company, as prescribed by the Act (46 & 47 Vict. c. 43, s. 6), and also any other matters which it may appear necessary to them to inquire into and determine upon, in order to ascertain the amount which may be applicable out of the receipts of the Company to the payment of the guaranteed dividend and the contribution of the guaranteeing baronies, and thereupon to apportion and determine the amount of the half-yearly sum to be paid by the baronies or by the Company. This, then, was within their jurisdiction, and their determination in the premises is, so far as they are concerned, binding on the Grand Jury and the baronies and the Company. If any action of the Company is challenged as *ultra vires*, it is not beyond review; but I think that, when the arbitrators find annual charges like these (which, *prima facie*, are lawful) in existence, the Legislature intended that their adjustment, and the determination of the incidence of these charges to capital or revenue, should be final, and therefore, in the circumstances of this case, I think that *certiorari* to quash the certificate of the arbitrators is not the way to raise the questions of *ultra vires*, which have been discussed.

The result of the adjudication of the Court is therefore that the motion for a writ of *certiorari* will be discharged, and that the conditional order for a writ of *mandamus* will be made absolute. As to costs, the Court is of opinion that this is not a case in which one set of costs could be made applicable to these two motions, because, although argued at the same time, the two applications

Q. B. Div. 1893. THE QUEEN v. CO. CLARE GRAND JURY. Johnson, J.

dealt with essentially distinct matters, and involved distinct considerations, which required to be separately argued by counsel. The costs of each motion must be dealt with independently. The application, therefore, for a writ of *certiorari* will be refused, with costs. The order for a writ of *mandamus* will be made absolute; but, as this does not necessarily conclude the matter, the costs cannot be awarded at present, unless it be notified that the Grand Jury do not intend to file a return. The order will lie in the office for a week before being finally drawn up, in order to enable the Grand Jury to consider what course they may think fit to adopt.

A. E. R. J.

Appeal. 1893. Nov. 28, 29.

The secretary for the Grand Jury of the county of Clare appealed (1).

The Right Hon. J. Atkinson, Q.C., G. Wright, Q.C., and *J. F. Vesey Fitzgerald*, for the appellant.

D. B. Sullivan, Q.C., Bushe, Q.C., and *D. M'Carthy Mahony*, for the respondents, were not called on.

The statutory provisions discussed during the arguments are fully referred to in the judgments.

WALKER, C.:—

We do not think it necessary to call on counsel for the respondents. We are all of opinion that the decision of the majority of the Court of Queen's Bench should be affirmed.

The question whether the West Clare Railway are entitled to apply for a *mandamus* to the Grand Jury to present the sums mentioned in the certificate delivered by the arbitrators to the secretary, depends upon the construction of the 7th section of the Act of 1883, which, after providing for the delivery of the certificates, enacts as follows:—"The Grand Jury are hereby required, from time to time, and without application to presentment ses-

(1) In the Court of Appeal, before WALKER, C., PORTER, M.R., and FITZGIBBON and BARRY, L.JJ.

sions, to present the sum mentioned in such certificates as payable by any barony, together with the costs and expenses of levying the same." And it further provides that if the Grand Jury fail to present the sum, or any part thereof contained in any such certificate, the treasurer of the county shall insert such sum, or such omitted part thereof, in his warrant for raising the moneys presented at the same Assizes. We are all familiar with the fact that there is a numerous class of compulsory presentments, for the enforcement of which applications for a *mandamus* may be made to the Queen's Bench.

What are the general provisions of the Act leading up to the enactment which I have read? The guarantee given by sect. 1 is not one which the Grand Jury are bound to make, but which, if they think fit, they may make, and when it is given the barony or baronies mentioned in the presentment become chargeable with the prescribed dividend on the paid-up share capital. In this case the Grand Jury have taken it upon themselves to make a presentment in favour of such a baronial guarantee. There are special provisions contained in the subsequent sections of the Act for the purpose of giving effect to this guarantee. The first is sect. 4, which provides that during the continuance of the guarantee the net receipts from the tramway, after deducting from the gross receipts the expenses of the management and working and proper maintenance of the tramway, shall be applied to the payment of a dividend at the guaranteed rate. Therefore, the expenses of the management and working have to be deducted from the gross receipts. Then, the 5th section is the same in effect, except that it applies to cases where there is a surplus of receipts, after deducting the expenses of management and working, and dividend at the guaranteed rate, and it provides that such surplus shall be paid by the Company to the treasurer of the county, to be applied in ease of former contributions. Then the 6th section contains a complete mode for ascertaining gross and net receipts, and for this end it provides that for the purpose of ascertaining the gross receipts, and the net receipts, and the amount of any half-yearly contribution, the Board of Trade may appoint as arbitrators the county surveyor and two other persons to be selected by the Board of Trade. Now, what is the power, and what are the duties of these arbitra-

Appeal. 1893. THE QUEEN v. Co. CLARE GRAND JURY. Walker, C.

tors, one of whom is the skilled representative of the Grand Jury? They are the following:—"And such arbitrators shall, from time to time, ascertain and determine the amount of the gross receipts and of the net receipts." They shall *determine* it, that is not a mere matter of vouching, but of determination. The section then goes on—"And also any other matters which it may appear necessary to inquire into and determine upon." They have therefore the widest power of ascertaining what are the expenses of management and working expenses. It is a case in which the very thing which is referred to the arbitrators, is the question which Mr. Fitzgerald said they have determined wrongly, namely, the amount of working expenses the expenditure on which has been challenged as illegal. Further, Mr. Fitzgerald contended in his argument that the arbitrators had no power to determine these matters at all, because they were beyond their powers. But that is directly contrary to the words of the Act of Parliament, which provides that "the arbitrators shall set forth the several matters so determined by them in certificates under their hands, or in case they do not agree, under the hands of any two of them, and such certificates shall be, in all respects, binding on the Grand Jury, and the baronies and the Company."

The next step is the delivery to the secretary of the Grand Jury of the certificate, evidencing the adjudication of the arbitrators; and when that takes place the enactment which I have already read comes into force, and the Grand Jury are, in my opinion, bound to present the specified sum. It would be extremely inconvenient that a fluctuating body like the Grand Jury should enter into the consideration of such legal questions as have been discussed before us.

I do not suggest that, if counsel for the Grand Jury are right, there is not a remedy against illegality, at all events as to the future. I wish it to be understood that all we do decide is that when the arbitrators have acted within the scope of their powers, and have made their adjudication, even if they were, in point of law, wrong on a question which they might and did decide, the sum mentioned in their certificate must be presented by the Grand Jury, and therefore that the order appealed from must be affirmed, and the appeal dismissed, with costs.

As to the question arising on the *certiorari*, I have expressed my opinion at an early stage of the argument.

PORTER, M.R. :—

I am of the same opinion, and I have nothing to add to what the Lord Chancellor has said as to the *mandamus*. The Act of Parliament makes the certificate binding and conclusive on the Grand Jury; and although, if the certificate had been made in respect of matters as to which the arbitrators had no jurisdiction that would afford a defence to an application for a *mandamus*; yet when the arbitrators are within their jurisdiction, the *mandamus* must go, though their discretion should be exercised wrongly. Neither the Queen's Bench nor the Court of Appeal could interfere.

Another matter arose in relation to the application for a writ of *certiorari*, and that was rested on two grounds. First, it was based on this ground (not appearing on the face of the certificate), that the finding of the arbitrators was made in alleged excess of jurisdiction. That is the same ground as was relied on against the *mandamus*, and I need not further notice it. But Mr. Atkinson, in the second place, argued it on another ground, which appears on the face of the certificate itself. It appears on the accounts that there was a balance in the hands of the Railway Company at the end of the financial half-year, which ought, it is said, to have been included in the amount distributable as dividend, but which the arbitrators in their certificate allowed to be carried forward to the next half-year as an unappropriated balance.

This ground was not put forward in the Court below in applying for the rule; and I am clear that the Grand Jury ought not to be allowed to go into it now. I regard it as a mere afterthought, and, plainly, had it been regularly brought forward in the first instance, different considerations and important facts applicable to it might have been before the Court. It might, for instance, have been shown that a similar balance was brought forward into the account from the previous half-year, and that thus the matter really corrected itself. I do not know how this is. It might, too, have been shown, if the fact was so, that the balance carried on was only the money in hand, needed for

Appeal. 1893.

THE QUEEN v. CO. CLARE GRAND JURY.

Porter, M.R.

urgent cash payments which had to be met forthwith. But none of these matters has been brought forward or investigated.

I am therefore of opinion that the Grand Jury cannot succeed, either with respect to the *mandamus* or as to the *certiorari*.

But our decision does not go beyond the purposes of the Act of Parliament for which the certificate is given: that is, we only decide that, for the purpose of ascertaining the amount of the guarantee, the certificate given by the arbitrators is final, and cannot be questioned in an application for *mandamus* or *certiorari*. I for one express no opinion as to whether the items about which the dispute has arisen are, or are not, properly "working expenses."

I further wish to add that we are not deciding that the Grand Jury and the ratepayers are without remedy, if their contention is right as to the facts.

FITZGIBBON, L. J.:—

I express no opinion that a balance in hands cannot be carried forward, for sufficient reason, and in a proper way.

Speaking for myself, I think that the arbitrators might say that some money may be retained in hand at the end of a half-year, or of a year, without going in ease of the guarantee. We cannot hold, as practical men, that at the end of each half-year every penny must be parted with. We have already held that money may be carried forward for the purpose of discharging liabilities properly outstanding. For all we know, the credit balance at the end of the half-year before us may have been carried forward from half-year to half-year for a long time, and may not be a credit earned in the period covered by this account at all.

On the main question, on which alone the *mandamus* was originally sought, I entertain a strong opinion. The field of the jurisdiction of these arbitrators goes beyond mere figures and book-keeping: it necessarily extends to deciding what are "working expenses." This is sometimes a mixed question of law and fact, sometimes a pure question of law, sometimes a pure question of fact. The same question might arise if the arbitrators were appointed by contract, and such arbitrators are often appointed by contract to decide questions of law, or mixed questions of law and

fact. These statutory arbitrators are better constituted than private arbitrators for dealing with difficult questions; they are appointed for public purposes and by public authority; they represent both the parties and the public, and the accounts with which they deal are submitted to an authoritative audit. I consider that they were appointed to decide just such questions as are brought before us here, and their decision is final. My impression is that the alleged wrong is not without a remedy. If injustice is done, the remedy is against the Company, which may be restrained from expending money wrongly. But that remedy cannot be applied in respect of past payments, so as indirectly to deprive the guaranteed shareholders of their dividend by altering the decision of the arbitrators as to the amount of the working expenses.

BARRY, L.J.:—

I have little to add. As to the application for a *certiorari*, I have nothing to add. As to the application for a *mandamus*, I was much impressed by the view put forward by Mr. Fitzgerald, that an application for a *mandamus* is to the discretion of the Queen's Bench, and also is in our discretion; and in this case it is made for the purpose of working an injury, as a device to evade the decision of the Privy Council as to the amount to be paid for the construction of the railway, and also as an evasion of the words of the order of the Privy Council, to make these expenses look as if they were working expenses, whereas they were demands, which ought to be made out of the capital. Well, now, the amount having been allowed to be given, does it not become compulsory on the Grand Jury to present the amount? When the case came before me—I was the Judge of Assize at the time—I never held that these were working expenses; on the contrary, I recommended that the Grand Jury should make the presentment for this small amount upon that occasion; but I never decided that it was working expenses. I called the attention of the Grand Jury to the matter, and stated that if they were desirous to raise the question, they should bring the matter to be decided at a future time in a proper way.

I recommended that a small amount should be paid by the

Appeal. 1893.

THE QUEEN v. Co. CLARE GRAND JURY.

Barry, L.J.

Grand Jury (£125); but I never decided that these sums of money were "working expenses." I think these are not working expenses. I do not refer to the rent of £51; but there was a considerable sum of money for works, and hire from other Companies for works, which ought to have been erected by the contractor.

I do not think the arbitrators ought to be a mere vouching body. It seems to me that the scope of the Act of Parliament was to create a *forum domesticum* to decide these questions, and in that view it enacts that one of the persons who must be on the board of arbitrators shall be the county surveyor—a public officer of the Grand Jury, whose duty it will be to see that nothing is done to interfere improperly with the interests of the ratepayers. Then, the words of the section say that the certificate is to be "final and conclusive"; but I decide the case on the general scope of the Act of Parliament, and not on the words "final and conclusive."

As to the question of the balance carried over, it is enough for me to say that that question was not opened in the Court below.

Appeal dismissed.

Solicitors for the West Clare Railway Company (Limited): *O'Connor & Dudley.*

Solicitor for the secretary of the Grand Jury of the county of Clare: *J. F. Cullinan.*

R. D. M.

O'CONNOR *v.* NORWICH UNION FIRE AND LIFE INSURANCE SOCIETY (1).

Q. B. Div. 1894. April 23, 25.

(No. 1894. 1002.)

Arbitration—Fire insurance—"Adjustment of loss"—Proviso against suing, in cases where a difference has arisen as to the adjustment of a loss, before the determination of the amount by arbitrators—Condition precedent—Motion to stay action—C. L. P. Act, 1856 (19 & 20 *Vict. c.* 102), *sect.* 14 *—Discretion.*

In an action on a fire policy, the defendants, before defence, moved to stay the proceedings, on the ground that the policy was made subject to a condition that, if any difference should arise in the adjustment of a loss, the amount to be paid should be submitted to arbitration, and that the insured should not be entitled to commence or maintain any action upon the policy until the amount of the loss should have been referred and determined as therein provided, and then only for the amount so determined. The amount of the loss was admittedly considerably in excess of the amount of the policy, the only matter of dispute being whether the plaintiff, by storing petroleum on the premises insured, had violated another condition. There had not been, however, any reference to arbitration:—

Held, that, no difference having arisen in the adjustment of the loss, the motion must be refused.

Viney v. *Bignold* (20 Q. B. Div. 172) and *Scott* v. *Avery* (5 H. L. Cas. 811) distinguished.

MOTION to stay proceedings in the action, and for the costs therein incurred. The writ of summons was indorsed with a claim for £200, amount of a policy of fire insurance, and also for damages for fraudulent misrepresentation and for breach of contract.

The policy contained, amongst others, the following condition: —"No. 21. If any difference shall arise in the adjustment of a loss, the amount (if any) to be paid by the society shall, whether the right to recover on the policy be disputed or not, and independently of all other questions, be submitted to the arbitration of some person to be chosen by both parties, or of two indifferent

(1) Before HARRISON, JOHNSON, and HOLMES, JJ.

Q. B. Div. 1894.

O'Connor v. Norwich Insurance Co.

persons, one to be chosen by the party insured, and the other by the directors; and in case either party shall refuse or neglect to appoint an arbitrator within twenty-eight days after notice, the other party shall appoint both arbitrators; and in case of the arbitrators differing therein, the amount shall be submitted to the arbitration of an umpire, to be chosen by the arbitrators before they proceed to act; and the award of the arbitrators or umpire (as the case may be) shall be conclusive evidence of the amount of the loss, and the party insured shall not be entitled to commence or maintain any action at law or suit in equity upon his policy until the amount of the loss shall have been referred and determined as hereinbefore provided, and then only for the amount so awarded. Each party to pay his or their own costs of the reference and a moiety of the costs of the award and of the arbitrators and umpire; and the reference in all other respects to be subject to such rules and conditions as are usually inserted in orders of reference at *Nisi Prius*, if the parties differ about the same."

The policy also contained a special condition that no petroleum or other mineral oil or product thereof should be deposited or kept for sale on the premises.

The defendants alleged, and it was admitted, that no reference as to the loss alleged to have been sustained had been made, nor had the amount of the loss been determined by arbitration, as provided by the 21st condition. The plaintiff, however, deposed, and it may be taken for the purposes of this report to be admitted, that no question as to amount or adjustment of loss had arisen between plaintiff and defendants, but that the loss actually sustained amounted to the sum claimed, and that the real and only question between the parties was that it was alleged that the plaintiff had stored petroleum oil on the premises contrary to the special condition contained in the policy.

A. F. Blood, for the defendants:—

The ascertainment by arbitration of the amount of the loss under the 21st condition is a condition precedent to the right to recover under the policy: *Viney* v. *Bignold* (1); *Scott* v. *Avery* (2).

(1) 20 Q. B. Div. 172. (2) 5 H. L. Cas. 811.

The defendants have a double right; they may either plead the condition as a defence, or they may move to stay the action. [HOLMES, J.: Is there any case where such a defence was not raised by plea?] Yes; in *Kenworthy* v. *Queen Insurance Co.* (1), and in *Trainor* v. *Phœnix Fire Insurance Co.* (2). [JOHNSON, J.: But in that case there was no reservation of a further defence, such as that which is here stated to exist.] Our application is in general terms, and the Court should stay the proceedings, either under the power conferred by the C. L. P. (Ir.) Act, 1856, s. 14, or under their inherent jurisdiction to stay vexatious actions. [The Court intimated that the latter view was untenable.] The statutory power is at least ample; and the language of the Lord Chancellor in *Scott* v. *Avery* (3) is exactly in point. [Counsel referred also to *Scott* v. *Mercantile, &c., Society* (4); C. L. P. Act (Eng.), 1854, s. 11; the Arbitration Act (Eng.), 1889.]

Brereton Barry, for the plaintiff:—

The application is merely intended to embarrass and delay the plaintiff. The reference would be illusory, and the plaintiff would have to bear his own costs. There is no dispute as to amount, and the real question—as to storage of petroleum—cannot be decided by reference, and must, in any event, be tried in a Court of law. The cases cited for the defendants are therefore distinguishable. The defendant may raise the question by plea; but even so, he must plead that a difference arose in the adjustment of the loss. In *Viney* v. *Bignold* (5) the defence alleged that a difference had arisen, *i.e.* a difference in the adjustment of the loss. This condition was not intended to provide for the reference of all matters in dispute, for a general condition as to liability would at that time have been held to be bad: see *Goldstone* v. *Osborn* (6). [Counsel referred to The Annual Practice (ed. 1894), p. 164, and *Smith* v. *Allen* (7).] The power conferred by sect. 14 of the C. L. P. Act, 1856, is discretionary, and the present is not a case in which it should be exercised.

(1) 8 *Times'* Rep. 211.
(2) 65 L. T. (N. S.) 825.
(3) 5 H. L. C. 811.
(4) 66 L. T. (N. S.) 811.
(5) 20 Q. B. Div. 172.
(6) 2 Car. & P. 550.
(7) 3 F. & F. 156.

Q. B. Div. 1894.

O'Connor v. Norwich Insurance Co.

April 25.

A. F. Blood, in reply, referred to *Randegger* v. *Holmes* (1).

Cur. adv. vult.

Harrison, J.:—

This case came before the Court upon a motion, made on behalf of the defendants, that all proceedings in the action should be stayed, and that all costs incurred by the defendants, including the costs of this application, should be paid by the plaintiff to the defendants.

The action was one upon a policy of fire insurance, and no defence has been yet put in. The motion is to stay the proceedings on the grounds put forward in the affidavit of Alexander D. Kennedy, relying upon the 21st condition contained in the policy in question. This condition, which is one of a number indorsed upon the policy, is in its terms the same as the condition set out in the case of *Viney* v. *Bignold* (2), which was referred to and relied upon during the argument. I may therefore read the condition as given in the English case. [His Lordship read the condition, and continued:—]

Now, it is admitted at the bar, and there is no doubt, that in the present case no steps have been taken to put this clause in force. Mr. Barry contends that this condition is here inapplicable, and that it would be a wholly useless proceeding to refer the matter of amount to arbitration before bringing this action into Court. For, he says, it is admitted that no question of adjustment of loss or of amount has arisen; and the defendants have never disputed the reality or amount of the loss, but have insisted upon the invalidity of any claim which may be put forward because of the alleged violation of another clause in the policy, alleging that the plaintiff had kept petroleum upon his premises; therefore, that the question which is really at issue is one which has nothing to do with the 21st condition of the policy, and that it would be useless to take steps to ascertain what the amount of the loss is, when the real defence is one which lies behind, and which must in any event be tried out.

A number of cases have been cited, of which *Scott* v. *Avery* (3)

(1) L. R. 1 C. P. 679. (2) 20 Q. B. Div. 172. (3) 5 H. L. Cas. 811.

is the most important, to show that a reference to arbitration and an award are conditions antecedent to any right to sue. That may be so if a state of facts were shown to exist which would make the provisions of this condition applicable. By its terms, however, its provisions only apply "if a difference shall arise in the adjustment of a loss," &c.; and it must, in my opinion, be shown affirmatively that such a difference has arisen before the provisions of this condition can be enforced. In *Viney* v. *Bignold* (1) a defence had been put in which averred that a difference had arisen, and upon the argument (which was in the nature of a demurrer) that must have been taken as admitted. In the present case no such defence has been filed, nor has it been shown that a difference has arisen in the adjustment of the loss within the meaning of the condition.

In my opinion the motion must be refused.

JOHNSON, J.:—

I agree. The contention on behalf of the defendant Company is that, as they dispute the plaintiff's right to recover on this policy, a difference has arisen in the adjustment of a loss within the 21st condition, and that the amount of the loss must first be determined by arbitration before this action can be commenced or proceeded with. If that contention is right it is a complete defence to the action, and the present application is unnecessary. But the contention is further, that if and when the amount of the loss is determined by arbitration, it will still be open to the defendant Company to resist the plaintiff's demand altogether, on the ground that he has precluded himself from recovering any amount on the policy by bringing petroleum on the premises, contrary to the terms on which the policy was effected. If so, it would be a useless waste of time and money to refer the amount of the loss to arbitration when no amount would, in that view, be recoverable. On the other hand, the plaintiff contends that the defendant Company do not, and never did, dispute the amount of the loss, and therefore that no difference has arisen in the adjustment of a loss within the 21st condition, and that the only dispute

(1) 20 Q. B. Div. 172.

Q. B. Div. 1894.

O'Connor v. Norwich Insurance Co.

Johnson, J.

is whether or not the plaintiff is barred from recovering, by having petroleum on the premises, and therefore the occasion for reference to arbitration has not arisen. In that case the reference would be useless and unmeaning, and the plaintiff's right of action would not be affected by the fact that the amount of loss has not been determined by arbitration. These are matters to be raised and decided on the pleadings. On this motion I do not anticipate by any opinion the true construction of the policy and the 21st condition; but, under these circumstances, I am not satisfied that no sufficient reason exists why this application ought not to be granted.

Holmes, J.:—

As the Court is in this case asked to exercise the jurisdiction conferred on it by the 14th section of the 19 & 20 Viot. c. 102, under peculiar circumstances, I desire to state the grounds upon which I concur in refusing the application.

The plaintiff claims under a policy of fire insurance, and, as far as I can gather, the only matter in controversy is whether he violated a condition of the policy by the storage of petroleum.

Now, if it was a term of the contract that a difference of this kind was to be settled by arbitration, I should not hesitate to stay the action. Even if the stipulations were framed in such a way as to constitute a defence, I should hold that it was not necessary to plead it, and that we ought to prevent the plaintiff from proceeding by an exercise of our summary jurisdiction. But there is no provision in the plaintiff's policy that such a controversy as has arisen is to be referred to arbitration. There is a carefully drawn clause, by which it is agreed that the amount to be paid, as distinguished from liability to pay anything, is to be settled by arbitrators, and that no action can be commenced until they shall have determined such amount. One result of this clause may be to render two proceedings necessary where there is a dispute as to the amount of the loss as well as a denial of all liability; but this ought not to be a ground of complaint to either of the parties who have made it a term of the contract; and, if there were such a dispute in this case, I should hold that the defendants are entitled to have the action stayed until that dispute should be determined in the stipu-

lated manner. But the peculiarity of the present application is that there is no controversy as to the sum claimed. The plaintiff asked for £200, and he says that property covered by the policy has been damaged to a much larger extent than is represented by this sum. The defendants' assessor has visited the place, and made his report. Before action no suggestion was made that the plaintiff had claimed too much, if he was entitled to anything. No such suggestion has been made up to the present moment; and, if I am to judge from the way in which the case has been presented, this application is made, not for the purpose of having a question within the jurisdiction of the arbitrators determined by them, but in the hope that they may be induced to give a decision upon a matter that is outside the scope of their authority. Well, under such circumstances, I shall not be a party to exercise the summary jurisdiction of the Court, if I have a discretion in the matter. I think not only that I have such a discretion, but that, if the facts were set forth in the pleadings, and the defendants moved for judgment thereon, they would probably fail. What is the true construction of the arbitration clause? It all depends upon the opening words—"if any difference shall arise in the adjustment of a loss." The remainder of the clause only applies when the condition contained in these words exists.

The defendants argue that any dispute between the parties, even if it amounts to a denial of all liability, is a difference in the adjustment of a loss. This is, no doubt, a possible construction, and it might be adopted if it were necessary to make what follows intelligible; but it is not the natural meaning of the words themselves. "Adjustment" is used as a term of art in connexion especially with marine insurance, implying the ascertainment of the amount of the indemnity to which the policy-holder is entitled from the underwriters after all proper credits and allowances are made. I think it has the same meaning in this provision, and that it is the only meaning that will make the whole clause consistent. If I were to adopt the construction contended for by the defendants, what necessity would there be for introducing immediately after words the parenthesis, "whether the right to recover on the policy be disputed or not"? Upon the defendants' construction, a difference in the adjustment of a loss would, in itself, include a

Q. B. Div. 1894.

O'Connor v. Norwich Insurance Co.

Holmes, J.

denial of the right to recover on the policy. But, in truth, the defendants' construction makes the stipulation absurd. What could be more natural than to introduce an arbitration clause by the statement that it was to come into operation when a difference arose regarding a matter over which the arbitrators were given jurisdiction? What would be less reasonable than to make the operation of the arbitration clause depend upon a controversy arising on a matter with which the arbitrators could have nothing to do? The question to which I have referred could not have been argued or decided in *Viney* v. *Bignold* (1). In that case there was a defence filed, averring that a difference had arisen. It did not appear from the pleadings or otherwise what was the nature of the difference; and the Court was bound to assume that a difference within the meaning of the opening words of the clause had arisen.

In refusing this application, we do not preclude the defendants from delivering a defence, raising the point that has been discussed before us, and having it determined by the highest tribunal.

Solicitor for the defendants: *A. D. Kennedy.*
Solicitor for the plaintiff: *H. A. Wynne.*

A. E. R. J.

(1) 20 Q. B. Div. 172.

FITZGERALD, LANDLORD; WALSH, TENANT (1).

Land Com. 1894. July 27.

Caretaker notice—Liability to mesne rates after service of—50 & 51 *Vict. c.* 33 —33 & 34 *Vict. c.* 46, *ss.* 21, 70.

A tenant who has been converted into a caretaker by service of the notice prescribed by the 7th section of the Land Law (Ireland) Act, 1887, and who has served a claim for compensation for improvements under the Landlord and Tenant Act (Ireland), 1870, and has continued in the beneficial enjoyment and receipt of the profits of the holding, is liable to pay mesne rates in respect of the period between the service of the notice under the Act of 1887, and the payment to him, or lodgment in Court, of the compensation awarded under the Act of 1870; and, accordingly, where the amount awarded has been lodged in Court, under the 21st section of the Act of 1870, the Land Commission, affirming the decision of the County Court Judge, set off the amount due for mesne rates against the compensation money; and, the balance due to the landlord amounting to more than the sum lodged in Court, directed the amount so lodged to be paid out to him.

APPEAL from an order of the County Court Judge of the county of Waterford, setting off an amount due for mesne rates in respect of occupation by the tenant of his holding between the service of a caretaker notice under the 7th section of the Land Law (Ireland) Act, 1887, and the payment into Court of the compensation for improvements awarded to the tenant under the Act of 1870. The order appealed from directed payment to the landlord of the money lodged, as the accounts showed a balance due to the landlord for mesne rates greater than the sum lodged.

The material facts are as follows:—

An ejectment decree was, on the 20th April, 1891, obtained by the landlord against the tenant for non-payment of £74 14*s.*, arrears of rent up to the 25th March, 1891. On the 4th July, 1891, the prescribed notice, under the 7th section of the Land Law (Ireland) Act, 1887, was served on the tenant, and duly posted. On the same day the tenant served a notice of a claim for improve-

(1) Before BEWLEY, J., and FITZGERALD, Q.C., Commissioner.

Land Com. 1894.

FITZGERALD, *Landlord*; WALSH, *Tenant.*

ments under the Landlord and Tenant Act (Ireland), 1870, claiming a sum of £255 10*s.*, and the landlord subsequently served notice of dispute, and also claimed to set off against the amount of the compensation the £74 14*s.* due under the decree, £22 10*s.* for mesne rates to 29th September, 1891, and £2 7*s.* 6*d.* for costs. The County Court Judge, on the hearing of the claim for compensation, allowed the set-off claimed by the landlord, and gave the tenant a decree for the balance, which he found amounted to £73 11*s.* 6*d.* From this decision the landlord appealed to the Land Commission, and the decree was reduced to £39 6*s.* 10*d.*

After the service of the caretaker notice the tenant continued to till and use the lands in the same manner as theretofore, and applied the profits to his own use. On the 5th April, 1893, the £39 6*s.* 10*d.* was lodged by the landlord in the County Court, under the 21st section of the Landlord and Tenant Act, 1870, and he subsequently obtained possession of the holding. The landlord and tenant each applied for payment out of the said sum, and the County Court Judge made an order for payment to the landlord, finding that, after allowing credit for the value of the crops on the lands when possession was taken by the landlord, there was due to him for mesne rates for the period between the 29th September, 1891, and the 5th April, 1893 (the date of the lodgment of the amount awarded), a sum exceeding the amount of the compensation money.

Cooper, for the appellant, contended that the tenancy had been determined by the service of the caretaker notice, and that the tenant could not be liable for mesne rates, that therefore the set-off should be disallowed, and the amount awarded for compensation paid to the appellant.

Cherry, for the respondent, relied on the 70th section of the Landlord and Tenant Act, 1870, which provides that notwithstanding the determination of the tenancy, the tenant "shall be deemed to be a tenant until the compensation due to him has been paid or deposited." He contended that so long as the tenant had a right to enjoy and occupy the land he should pay either rent or mesne rates, and that the landlord's set-off should be allowed, and the order of the County Court Judge affirmed.

BEWLEY, J. :—

In this case we are of opinion that the question is reasonably free from difficulty. The application comes before us on appeal from an order of the County Court Judge of Waterford, by which he ordered certain moneys, deposited in Court under the provisions of the 21st section of the Landlord and Tenant Act, 1870, to be paid out of Court to the landlord.

It appears that in the year 1891 a decree in an ejectment for non-payment of rent was obtained against the tenant. On the 4th July in that year the tenant served a claim for compensation for improvements, under the Act of 1870, and on the same day the prescribed notice under the Act of 1887 was served upon him. Thereupon he became technically a caretaker. The claim for compensation was prosecuted, and the County Court Judge made an order thereon, which was varied on appeal, and the sum of £39 6*s.* 10*d.* ultimately allowed; and on the 5th April, 1893, the landlord lodged the sum awarded in the County Court, under the provisions of the 21st section of the Landlord and Tenant Act, 1870. Applications were made, both by the landlord and tenant, to the County Court for payment out of the money lodged. The landlord claimed that mesne rates should be paid to him by the tenant in respect of the tenant's occupation of the holding from the 4th July, 1891, and the County Court Judge decided that the landlord was entitled to mesne rates up to the date of the lodgment in Court of the compensation; and, having taken an account between the landlord and tenant, crediting the tenant with the value of the crops which were on the lands when possession was taken by the landlord, he found that there was a balance due by the tenant to the landlord of over £40, and he made an order for payment out to the landlord of the £39 6*s.* 10*d.* in Court.

It has been contended for the tenant that this order is illegal, because no mesne rates could be payable by a person who had ceased to be tenant, and who had been converted into a caretaker by service of the statutory notice. There is no dispute that during the period for which the mesne rates are claimed the tenant was in the actual occupation and enjoyment of the lands, tilling and using the same as if he had a beneficial interest therein, and applying the profits to his own use, and by the 21st section of the

Land Com. 1894.

FITZGERALD, *Landlord*; WALSH, *Tenant*.

Bewley, J.

Landlord and Tenant Act, 1870, "a tenant, who may be decided by the Court to be entitled to compensation, to be paid by any landlord, shall not be compelled, by process of law, to quit his holding until the amount of compensation due to him has been paid or deposited." This same section also provides that where the tenant remains in possession the Court may take mesne rates into consideration, in the event of such application being made as therein stated, recognizing that mesne rates may be payable in a case where the relation of landlord and tenant has ceased to exist. This results from the 70th section, which provides that where the tenancy of any person having been a tenant under a tenancy which does not disentitle him to compensation under the Act, is determined or expiring, he shall, notwithstanding such determination or expiration, be deemed to be a tenant until the compensation (if any) due to him under the Act has been paid or deposited. Therefore, although Patrick Walsh was not strictly a tenant in law, he was to "be deemed to be a tenant" during this period, and this makes him liable to pay mesne rates under the circumstances stated. The order of the County Court Judge is right, and we must dismiss this appeal, with costs.

Solicitor for the landlord: *Hunt.*
Solicitor for the tenant: *Williams.*

T. H. M.

INDEX.

ACCOMMODATION LAND—Town park
See TOWN PARK. 1, 2. [473, 611

ACCOUNT STATED—*Auctioneer—I O U accepted for deposit—Consideration—Right of action.*] Under conditions of sale by auction the deposit was payable to the auctioneer immediately after the sale. The auctioneer, without the consent of the vendor, took the purchaser's I O U for the amount:—*Held*, that an action lay at suit of the auctioneer against the purchaser for the amount of the I O U. *Hodgens* v. *Keon* - - Ex. 657; App. 662

ACCOUNTS—Municipal - - - 489
See MUNICIPAL EXPENDITURE.

ACTION TO RECOVER POSSESSION OF LAND—Eviction notice—Parliamentary franchise - - - - 434, 451
See PARLIAMENT. 2, 3.

ADMINISTRATION—Grant of—Relation back—Parliamentary franchise - 285
See PARLIAMENT. 7.

ADMINISTRATION ACTION — *Practice—Staying proceedings.*] *W. P.* deposited with the *U.* Bank, as security for a loan, two leases, alleged to be the property of *H. P.*, wife of *W. P. W. P.* having died, an action for the administration of his personal estate was brought against his personal representative by the *U.* Bank. *H. P.* was not a party to this action. *H. P.* having brought an action against the *U.* Bank to recover the leases:—*Held*, that this latter action should not be stayed pending the administration action, as the full relief claimed by the plaintiff could not be given in the administration action. *Parke* v. *Ulster Bank (Limited)*, - - - - - Q. B. 652

ADVERSE POSSESSION—Statute of Limitations - - - - - 1
See LIMITATIONS, STATUTE OF.

AGENT—*Agency contract—Construction—Commission — Orders incomplete at termination of agency.*] A contract for agency provided that the agent was to be paid a commission for work done or supplied in Ireland from the date of the contract at 6¼ per cent. on amount of orders;

AGENT—*continued.*
that the contract should be terminable on notice—neither party to be entitled to compensation, but the agent to receive (on the termination of the contract) such commission as should have been earned, and should be or become payable:—*Held*, that on the terms of the agency contract the plaintiff (the agent) was not entitled to be paid commission in respect of work, the order for which was obtained by his negotiation, but which was not done until after the agency had been determined. *Hilton* v. *Helliwell* - - - Q. B. 94

—— Covering letter—Condition - - 663
See CONDITIONAL CONTRACT.

ANALYSIS—Purchase of sample for—Sale of Food and Drugs Act - - 78
See BUTTER.

APPEAL—Land Commission—Application to state case—Whether frivolous and vexatious - - - - - - 394
See LAND COMMISSION.

—— Leave—Housing of Working Classes Act, 1890 - - - - - - 181
See COMPULSORY PURCHASE.

—— Local Government Board—34 & 35 Vict. c. 109, s. 11 - - - - 489
See MUNICIPAL EXPENDITURE.

—— Registry—Costs - - - - 381
See PARLIAMENT. 14.

ARBITRATION—*Fire insurance—"Adjustment of loss"—Proviso against suing, in cases where a difference has arisen as to the adjustment of a loss, before the determination of the amount by arbitrators—Condition precedent—Motion to stay action—C. L. P. Act*, 1856 (19 & 20 *Vict. c.* 102), *sect.* 14—*Discretion.*] In an action on a fire policy, the defendants, before defence, moved to stay the proceedings, on the ground that the policy was made subject to a condition that, if any difference should arise in the adjustment of a loss, the amount to be paid should be submitted to arbitration, and that the insured should not be entitled to commence or maintain any action upon the policy until the

ARBITRATION—*continued.*
amount of the loss should have been referred and determined as therein provided, and then only for the amount so determined. The amount of the loss was admittedly considerably in excess of the amount of the policy, the only matter of dispute being whether the plaintiff, by storing petroleum on the premises insured had violated another condition. There had not been, however, any reference to arbitration:—*Held*, that, no difference having arisen in the adjustment of the loss, the motion must be refused. *Viney* v. *Bignold* (20 Q. B. Div. 172) and *Scott* v. *Avery* (5 H. L. Cas. 811) distinguished; *O'Connor* v. *Norwich Union Life and Fire Insurance Society* - - - - - - Q. B. 723

ARBITRATORS—Certificate—Guaranteed dividend—Working expenses - 691
See Tramway.

ARREST—Contempt of Court—Petty Sessions
See Justices. 2. [351

AUCTIONEER—Deposit—I O U 657, 662
See Account Stated.

AUDITOR—Local Government Board—Municipal accounts - - - - - 489
See Municipal Expenditure.

BARONIAL GUARANTEE—Light railway—Working expenses - - - 115
See Working Expenses.

—— Tramway—Arbitrators' certificate - 691
See Tramway.

BARONY—Surplus of grand jury cess—Application of - - - - - - 199
See Grand Jury.

BOAT—By-law requiring license—Harbour Commissioners—*Ultra vires* - - 384
See By-Law.

BONA FIDE OCCUPATION—*Subletting to labourers—Subletting of a trivial nature—Rent paid in labour*—50 & 51 *Vict. c.* 33, *s.* 4.] *W.*, the lessee, under a lease for three lives, was in occupation of the lands demised, which comprised 162 acres statute measure, with the exception of three small portions sublet to agricultural labourers. The sub-tenants were (1) *L.*, who had a cottage and 2½ acres; (2) *W.*, who had a cottage and 2 acres; and (3) *S.*, who had about half an acre. No money rents were paid by the sub-tenants; but they gave three days' labour a-week to the lessee *W.* in return for their holdings. Labourers were necessary for the farm:—*Held* (reversing the decision of the Land Commission), that the sublettings were trivial, and the lessee must be deemed to be substantially in occupation of his holding. *White, Tenant*; *White, Landlord* - App. 573

2. —— *Subtenancy determined by judgment in ejectment for non-payment of rent and service of eviction notices—Application by middleman to have fair rent fixed against his landlord before removal of caretaker—Occupation by middleman—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 57. —*Land Law (Ireland) Act*, 1887 (50 & 51 *Vict. c.* 33), *s.* 7.] A tenant, having sublet to her own landlord, brought an action and recovered judgment for possession for non-payment of rent, and served the eviction notices under section 7 of the Land Law (Ireland) Act, 1887, a herd of the subtenant being at the time in occupation. More than a month after service, but before the period for redemption had expired, and without proceeding to obtain physical possession of the lands, the tenant served an originating notice to have a fair rent fixed in respect of her tenancy:—*Held*, that the tenant was, at the date of the originating notice, in occupation of the lands. *Garnett, Tenant; Garnett, Landlord* - Land Com. 41

—— Subletting—Triviality—Land Law (Ireland) Act, 1887, p. 4 - - - 637
See Subletting.

BUILDINGS—Covenant to deliver up or surrender—Fair rent - - - 101
See Fair Rent. 3.

BURDEN OF PROOF—Town park—Increased value - - - - - - 611
See Town Park. 2.

BURGESS ROLL—Municipal franchise 346
See Municipal Borough.

BUTTER—*Exposed for sale in bulk—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *sect.* 17—42 & 43 *Vict. c.* 30, *sect.* 5—*Right of authorized officer to purchase a small quantity for analysis.*] Section 17 of the Food and Drugs Act, 1875, applies to articles of food, &c., exposed for sale by wholesale as well as by retail. *M'Hugh, Appellant; M'Grath, Respondent* - - Q. B. 78

BY-LAW—*Harbour Commissioners—Statutory powers regulating the conduct and hire of boats plying in harbour—By-law requiring boats to be licensed*—Ultra vires—*Londonderry Port and Harbour Act*, 1854 (17 & 18 *Vict. c. clxxvii.*), *sect.* 26.] Harbour Commissioners were empowered by statute to make by-laws for regulating and fixing the conduct and hire or fare of all boats or ferry-boats plying in the harbour, and for regulating the conduct of boatmen, ferrymen, and others plying in the harbour:—*Held*, (*diss.* Murphy, J.), that a by-law, requiring the owners of boats carrying passengers within the port to take out an annual licence from the Commissioners under a penalty was *ultra vires*. *Londonderry Port and Harbour Commissioners* (*Complainants*), *Appellants; Londonderry Bridge Commissioners* (*Defendants*), *Respondents* - - - - - - - Ex. 384

CARETAKER—50 & 51 Vict. c. 33, s. 7 41, [434, 451, 731
See Bona fide Occupation. 2.
Mesne Rates.
Parliament. 2, 3.

CARRIERS—*Land and sea carriage—Contract, where entered into.*] The plaintiff's cattle were shipped at Dundalk for the purpose of being carried to Cambridge under the following circumstances:—They were conveyed from Dundalk to Liverpool by the Dundalk Steam Packet Company, and from Liverpool to Cambridge by the defendants, who had statutory running powers over a line of railway from Liverpool to Godley Junction, and were owners of a line from Godley Junction to Cambridge. The cattle were injured during the railway journey through the negligence of the defendants; but in order to sustain the action in Ireland the plaintiff was bound to prove a contract of carriage entered into at Dundalk. There are three railway lines from Liverpool to Cambridge. The Railway Companies have no traffic agreement with the Steam Packet Company, but send to the Steam Packet Company books of blank manifests, and employ canvassers, paid by commission, to induce shippers to select their employers' route. In relation to the plaintiff's cattle, two documents were signed at Dundalk—first, a contract note, headed "Contract for freight and conveyance of live stock." Lower down were the words "Freight, &c., by the 'Emerald Isle' steamer, from Dundalk to Liverpool." In a table at foot the rate of freight was stated to be 4*s.* per head, which was the freight to Liverpool only. Amongst other conditions in the note was the following:—"If live stock . . . are, for the convenience of consignees, booked through, or addressed for any place beyond the port of steamer's destination, this Company shall not be held accountable for any loss or damage to said live stock . . . after being landed on the quay or wharf at aforesaid port." This note was signed by the plaintiff's agent. There was written on the note "G. N. Ry." (being the initials of the defendant Company) "Cambridge." Secondly, a manifest, which was signed by the canvasser of the defendant Company, was headed "Manifest of cattle booked through at Dundalk, for which tickets have been issued at Edge Hill, Liverpool." At Liverpool a ticket was issued by the agents there of the defendant Company to the plaintiff for the carriage of the cattle to Cambridge:—*Held* (*a*), that the contract with the Steam Packet Company was to carry to Liverpool only; but (*b*), as an inference of fact that there was a contract between the defendant Company and the plaintiff, made at Dundalk, for the carriage from Liverpool to Cambridge. *Cumming* v. *Great Northern, Manchester, Sheffield, and Lincolnshire Joint Railways* - - Ex. 208; App. 223

CASE STATED—Land Commission—Question of law - - - - - - 394
See LAND COMMISSION.

CASES—*Archer, Tenant; Earl of Caledon, Landlord* ([1894] 2 I. R. 473) explained 611
See TOWN PARK. 2.

CASES—*continued.*

—— *Barcroft* v. *Welland* (12 L. R. Ir. 35) considered - - - - - - 49
See RATES.

—— *Boyle, Tenant; Foster, Landlord* (30 L. R. Ir. 623) distinguished - - - 611
See TOWN PARK. 2.

—— *Doran* v. *Cunningham* (20 L. R. Ir. 544) observed on - - - - - 127
See FISHERY ACTS.

—— *Falls, In re* (3 Cr. & D. 267) questioned 346
See MUNICIPAL BOROUGH.

—— *Fitzpatrick* v. *Pyne* (13 Ir. C. L. R. 32) discussed - - - - - - 81
See JUSTICES. 4.

—— *Griffin* v. *Caddell* (I. R. 9 C. L. 488) considered - - - - - 61, 648
See SHERIFF.

—— *Jackson* v. *Hagan* (28 L. R. Ir. 326) dissented from - - - - - 590
See SURRENDER.

—— *Kearney* v. *Ryan* (2 L. R. Ir. 61) considered
See SHERIFF. [61, 648

—— *M'Donnell* v. *Blake* (28 L. R. Ir. 395) explained - - - - - 590
See SURRENDER.

—— *Magner* v. *Hawkes* (32 L. R. Ir. 285) commented on - - - 279, 557
See DEMESNE LANDS.

—— *Palmer* v. *Power* (4 Ir. C. L. R. 191) considered and followed - - 49
See RATES.

—— *Reg.* (*Cork and Muskerry Light Railway Co.*) v. *Cork Co.* (*Treasurer of*) (24 L. R. Ir. 415) approved of and followed - 115
See WORKING EXPENSES.

—— *Reg.* (*Bentham*) v. *Dublin* (*Justices of*) (14 L. R. Ir. 443) discussed and distinguished
See JUSTICES. 4. [81

—— *Reg.* v. *Surrey* (*Justices of*) (L. R. 5 Q. B. 466) discussed - - - - 489
See MUNICIPAL EXPENDITURE.

—— *Scott* v. *Avery* (5 H. L. C. 811) distinguished
See ARBITRATION. [723

—— *Smyth* v. *Moore* (32 L. R. Ir. 129) followed
See PRESENT TENANT. [480

—— *Viney* v. *Bignold* (20 Q. B. D. 172) distinguished - - - - - 723
See ARBITRATION.

—— *Waterford Turkish Baths Co.* v. *Barter* (17 Ir. L. T. R. 61) followed and applied 20
See THIRD PARTY.

CAUSE OF ACTION—Contract, where entered into - - - - - 208, 223
See CARRIERS.

CERTIFICATE—Arbitrators'—Tramway Company—Guaranteed dividend—Working expenses - - - - - 691
See TRAMWAY.

CERTIFICATE—*continued.*
—— Spirit grocer's license—Suitability of premises - - - - - - 246
See LICENSING ACTS.
CERTIORARI — Certificate of arbitrators — Tramways, &c., Act, 1883 - 691
See TRAMWAY.
—— Certificate of Local Government Board Auditor - - - - - - - 489
See MUNICIPAL EXPENDITURE.
—— Order of Justice of the Peace—Committal for trial - - - - - - 158
See JUSTICES. 1.
CLAIM BY VOTER.—Signature of claimant—Name on List - - - - 129
See PARLIAMENT. 1.
COMMISSION—Agency contract - 94
See AGENT.
COMMISSIONERS OF PUBLIC WORKS—Advances—Compensation for improvements - - - - - - 193
See IMPROVEMENTS.
COMMITTAL—For trial—Justice of the Peace
See JUSTICES. 1. [158
COMPENSATION—Improvements—Claim by Commissioners of Public Works 193
See IMPROVEMENTS.
COMPULSORY PURCHASE—*Housing of the Working Classes Act*, 1890—*Leave to appeal—Failure of Justice—Practice.*] The Court will not give to a person whose lands have been compulsorily acquired under the provisions of the Housing of the Working Classes Act, 1890, leave to appeal from the award of the arbitrator fixing the amount of compensation, merely on the affidavits of valuators who swear that in their opinion the amount awarded is less than the true value. Meaning of words "failure of justice" in Schedule II., Art. 26, considered. *Semble.*—A claimant, to whom several sums, each less than £1000, but amounting in the aggregate to more than £1000, in respect of an estate held under the same title, are awarded, may be given leave to appeal. Application for leave to appeal should be made by motion on notice before the Court, or by summons in Chambers. *In re Housing of the Working Classes Act*, 1890; *Ex parte Birch* - - - - Q. B. 181
CONDITIONAL CONTRACT—*Principal and agent—Covering letter—Condition—Waiver.*] *T.*, who was desirous of floating a gold mining Company in England, sent, through his broker *F.*, a letter to *D.*, a Dublin stockbroker, offering him a specified fee in consideration of the Company going to allotment, and *D.* allowing his name to be used as stockbroker. *D.* signed a letter of acceptance, which had also been forwarded to him by *T.*, through *F.*, and sent the acceptance to *F.* in a covering letter addressed to *F.*, in which *D.* mentioned that he signed the acceptance on the distinct
CONDITIONAL CONTRACT—*continued.*
understanding that Messrs. *H.* (an English firm of stockbrokers) also joined. The Company's prospectus was issued, but instead of the Messrs. *H., G. & Co.*, stockbrokers of equally high standing, appeared as the English brokers of the intended Company. *D.*, who was only interested in not being associated with what were commonly known as mining brokers, made no objection to the substitution, did not withdraw his own name, and acted as Dublin broker until the Company went to allotment. In an action for the fee:—*Held*, 1. That the complete contract in *T.'s* letter and *D.'s* acceptance could not be varied by the covering letter addressed to *F.* as *T.'s* agent. 2. That, as matter of construction, the covering letter was not intended to make the contract conditional upon *H.* being the English brokers. 3. That even if such a condition were imported into the contract, it could be waived by *D.*, being one for his benefit solely. *Maconchy* v. *Trower* - - - - - - H. L. 663
CONDITIONS OF SALE—Deposit payable immediately after sale—Credit given by auctioneer - - - 657, 662
See ACCOUNT STATED.
—— Name of vendor—Contract—Particulars
See VENDOR AND PURCHASER. [657, 662
CONSENT—Of next of kin to occupation as tenant—Parliamentary franchise [299, 312, 318, 339
See PARLIAMENT. 8–11.
—— To take off file agreement fixing fair rent—Jurisdiction, Land Commission - 44
See FAIR RENT. 2.
CONSIDERATION FOR CONTRACT — Failure—Sale by sheriff - 61, 648
See SHERIFF.
—— Giving time for payment of deposit—I O U taken by auctioneer - - 657, 662
See ACCOUNT STATED.
CONTEMPT—Petty Sessions Court—Arrest outside Court - - - - - 351
See JUSTICES. 2.
CONTINUING OFFENCE — Obstruction of highway - - - - - - 527
See JUSTICES. 3.
CONTRACT—Agency—Commission - 94
See AGENT.
—— Carriers—Where entered into 208, 223
See CARRIERS.
—— Condition—Waiver - - - 663
See CONDITIONAL CONTRACT.
—— Consideration for
See CONSIDERATION FOR CONTRACT.
—— Solicitor and client—Special remuneration
See COSTS. 5. [118
CONVICTION—Continuing offence - 527
See JUSTICES. 3.

CONVICTION—*continued.*
—— Sale of poisons by unqualified persons—Pharmacy Acts, 1875, 1890 - 8
See Poison.

COSTS—*Practice—Excessive claims for—Writ of summons—Irregularity—Setting aside.*] The Court will give a defendant his costs of a motion to set aside a writ indorsed with a claim for costs exceeding the amount allowed by Order III., Rule 7. *Harbison* v. *M'Larnon* - - - Q. B. 682

2. —— *Practice—"Set-off" of costs as between successful and unsuccessful defendants—R. S. C. (Ir.), Order LXV.* (1893), *Rules* 16 *and* 64 (20)—*Solicitor's lien* (2).] In an action for an assault and false imprisonment against three defendants *A*, *B*, and *C*, the plaintiff obtained a verdict and judgment against *A* with costs, while verdict and judgment were entered for the defendant *B* against the plaintiff with costs. On taxation, *B*, alleging that plaintiff had no means of otherwise satisfying his claim for costs, applied, under R. S. C., Order LXV., Rule 64 (20) to set off the costs payable by the plaintiff to the defendant *B* against the costs payable to the plaintiff by the defendant *A*. The plaintiff had previously assigned the amount of the judgment debt and costs due to him by the defendant *A* to his solicitor in consideration of the party and party costs due to him in the action. The Taxing Master having refused the application:—*Held*, that the deduction or set-off should have been made. A solicitor's lien upon costs, or upon a fund recovered through him by a party in an action, is subject to the rights of the parties *inter se*, including the right of set-off or deduction of costs as between successful and unsuccessful defendants. *M'Cormack* v. *Ross, Beatty, and Norman* [Q. B. 545

3. —— *Taxation (party and party)—Action involving question of title—Employment of second senior counsel at jury-trial at assizes.*] Where nominal damages (exceeding the limit within which the Judge's certificate for costs is required) are recovered in an action involving a question of title, the amount recovered cannot be taken as the measure of the importance of the action. *M'Bride* v. *M'Bride* - - - Q. B. 76

4. —— *Taxation (party and party)—Action of contract where plaintiff recovers less than £20—Plaintiff's costs of unsuccessful motion to set aside judgment by default—Common Law Procedure Act, 1853, sect. 243—R. S. C., Order LXV.* (1893), *Rule* 3.] Section 243 of the Common Law Procedure Act, 1853—providing that where a plaintiff in an action of contract recovers (exclusive of costs) less than £20, he shall not be entitled to more than one-half the ordinary costs—does not apply to the costs of a motion to set aside a judgment by default, where such motion has been refused with costs. *Spencer* v. *Hayes & Co.* - Q. B. 14

COSTS—*continued.*
5. ——*Taxation (solicitor and client)—Agreement for special remuneration of country solicitor personally attending trial or argument in Dublin.*] *Per* Harrison and Holmes, JJ. (*dubitante* Gibson, J.):—A country solicitor may contract with his client for special remuneration for his personal attendance in Dublin on the trial of an action or on a law argument. Such contract must be clearly shown to have been entered into by the client with full knowledge of its effect, and to be in itself just and reasonable. *Guardians of New Ross Union to Colfer* - - - - - Q. B. 118
—— Discretion of taxing officer—Number of counsel on new trial motion - 242
See Taxation of Costs.
—— Registry Appeal - - - - 381
See Parliament. 14.

COUNSEL—Three allowed—New trial motion—Discretion of taxing master - 242
See Taxation of Costs.
—— Three allowed—Trespass involving title to land - - - - - 76
See Costs. 3.

COVENANT TO RENEW—Lease not within Land Law Act, 1887, s. 1 - 238
See Fair Rent. 5.

COVENANT TO REPAIR—Action for breach of—Assignee of lease—Third party 20
See Third Party.

CRIMINAL LAW—Committal for trial—Certiorari - - - - - 158
See Justices. 1.

DAMAGES — Negligence — Light railway—Working expenses - - - 115
See Working Expenses.

DEFAULT OF PLEADING—Computation of time—Holidays - - - - 654
See Time.

DEMESNE LANDS—*Tenancy from year to year—Land used as demesne—Land Law (Ireland) Act,* 1881 (44 & 45 *Vict. c.* 49).] A holding consisted of 35 acres, which had been held by the tenant and his predecessors in title, under a yearly tenancy from the landlord and his predecessors in title, for a great number of years. The tenant and his predecessors owned freehold lands to the extent of about 1000 acres, including a mansion-house and demesne, which were adjacent to the holding in question. The holding had been used for non-agricultural purposes, planted, grazed, and treated as ornamental or accommodation land in connexion with the mansion-house:—*Held*, affirming the decision of the Land Commission (by Walker, C., and Barry, L.J.), that the land was neither agricultural nor pastoral *in its character*, and that a fair rent could not be fixed. *Held* (by Sir P. O'Brien, C.J., and Fitz Gibbon, L.J.), that the land was demesne land, and also was not

DEMESNE LANDS—*continued.*
agricultural and pastoral *in its character. Magner* v. *Hawkes* (32 L. R. Ir. 285) commented on. *Pratt, Tenant; Viscount Gormanstown, Landlord*
[Land Com., 279; App. 557

DEPOSIT—I O U taken by auctioneer
See Account Stated. [657, 662
—— Sale by sheriff—Want of title - 61, 648
See Sheriff.

DEVISE—Registration of title - - 381
See Parliament. 14.

DISTRESS — Default of — Non-payment of penalty—Imprisonment - - 363
See Penalty.

ECCLESIASTICAL LEASE—Sub-perpetuity—Redemption of rent - - 224
See Redemption of Rent.

EQUITY OF REDEMPTION—Sale by Sheriff—Deposit—Failure of consideration
See Sheriff. [61, 648

EVIDENCE—Town-park—Burden of proof
See Town Park. 2. [611
—— Trespass in pursuit of game - - 12
See Trespass in pursuit of Game.

EXECUTION—*Practice—Leave to issue—Judgment more than six years old—Order XLII., Rules 24 and 25—Application* ex parte.] Leave will not be given, in the absence of special circumstances, to issue execution on a judgment more than six years old, without notice to the party liable. *National Bank (Limited)* v. *Cullen* - App. 683
—— *Fieri facias*
See Fieri facias.

EXECUTOR — In possession without proving will—Yearly tenancy—Statute of limitations - - - - - 1
See Limitations, Statute of.

EXECUTOR DE SON TORT—Non adverse possession - - - - - 1
See Limitations, Statute of.

FAIR RENT—*Action for rent—Subsequent order fixing fair rent—Relation back—Credit for over-payments—Land Law (Ireland) Acts*, 1881, *sect.* 51, 1887, *sect.* 5.] An action for rent was brought on the 26th September, 1893. On the 28th September, 1893, the defendant obtained an order fixing a fair rent upon an originating notice which had been served in August, 1889. Calculating the rent due at the rate so fixed, and giving the tenant credit for over-payments in respect of earlier gales of the old rent, after the service of the originating notice, the total amount due for rent was reduced below £20:—*Held*, that the plaintiff was not entitled to any costs of the action. *Connor* v. *Lyons* - - - - - - - Ex. 24

2. —— *Agreement and declaration fixing, filed in Court—Consent that same be taken off the file—Jurisdiction of Land Commission—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 8 (6).] Agreements and declarations, fixing the fair rents of tenants' holdings were duly filed in Court, pursuant to section 8 (6) of the Land Law (Ireland) Act, 1881. Many years afterwards an application was made, on consent, that same be taken off the file, in order that originating notices might be served, and fair rents fixed by the land Commission:—*Held*, that the Land Commission had no jurisdiction to make the order, the agreements and declarations being regular in form and untainted with fraud. *Murray, Tenant; Scottish Provident Institution, Landlords. Others, Tenants; Same, Landlords* - Land Com. 44

3. —— *Buildings—Surrender of lease—Expiration of lease—Compensation for Improvements—Right of pre-emption—Land Law (Ireland) Act*, 1887, *sect.* 1.] An unexpired lease contained a stringent covenant against alienation, and a proviso, giving to the lessor, in the event of the covenant being broken, and in certain other events, a right of pre-emption at a sliding-scale of prices, so adjusted that if the event conferring the right of pre-emption happened at a date conterminous with the expiration of the term, the lessor should not be liable to any claim under the Land Act of 1870, or otherwise. The lease also contained a clause enabling the lessee "to determine the lease by surrendering the same" and "delivering up the premises and all buildings thereon," in which event the lessor was bound to pay to the lessee a sum to be calculated according to a sliding-scale so arranged that if the surrender was conterminous with the expiration of the lease, the landlord was not to be liable to any claim under the Land Act of 1870, or otherwise. The lessee served an originating notice to have a fair rent fixed under the Land Law (Ireland) Act, 1887:—*Held*, that, in fixing the fair rent of the holding, buildings erected by the tenant or his predecessors in title on the demised premises were not to be treated as exempt from rent. *Tighe, Landlord; Clements, Tenant* - - - - - - App. 101

4. —— *Fine—Improvements—Redemption of Rent (Ireland) Act*, 1891.] Where a grantor does not consent to the application of his grantee for redemption of a fee-farm rent under the Redemption of Rent (Ireland) Act, 1891, and the Court proceeds, on the alternative application, to fix a fair rent of the holding, the grantee is not entitled to any deduction in respect of a fine, in consideration of which, and of the surrender of a lease, the grant was made; nor is he entitled to be exempted from rent in respect of any improvements made by him or his predecessors in title:—*Diss.* O'Brien, Commissioner. *Mollan, Grantor; Kieran, Grantee*
[Land Com. 27

5. —— *Lease for lives and years renewable—Land Law (Ireland) Act*, 1887, *s.* 1.] A lease for three lives or thirty-one years, with a covenant by the

FAIR RENT—*continued.*
landlord to renew for one life, and for a concurrent term of twenty-one years, is not a lease within section 1 of the Land Law (Ireland) Act, 1887. *Gorman, Tenant; King-Harman, Landlord* [LAND COM. 238

—— Present tenant—Determination of middleman's tenancy by notice to quit 108
See NOTICE TO QUIT.

—— Present tenant—*Status*, when acquired 480
See PRESENT TENANT.

FEE-FARM GRANT—Fair rent fixed in lieu of redemption - - - - 27
See FAIR RENT. 4.

—— Sub-perpetuity under Church Temporalities Acts—Redemption of rent - 224
See REDEMPTION OF RENT.

FIERI FACIAS—Leave to issue after six years
See EXECUTION. [683

—— Sale under—Outstanding mortgage—Deposit—Failure of consideration - 61, 648
See SHERIFF.

FINE FOR OFFENCE
See PENALTY.

FINE ON LEASE—Fair rent fixed in lieu of redemption - - - - 27
See FAIR RENT. 4.

FISHERY ACTS—*Prosecution under* 32 *&* 33 *Vict. c.* 92, *sect.* 16—13 *&* 14 *Vict. c.* 88, *sect.* 53.] On appeal under 13 & 14 Vict. c. 88, sect. 53, a very strong case must be made to justify mitigation of the penalty prescribed by the statute. *Semble:* There is no jurisdiction to reduce the statutory penalty at all. Remarks on *Doran* v. *Cunningham* (20 L. R. Ir. 544). *Reg.* (*Alton*) v. *M'Auliffe* [GIBSON, J. 127

FRANCHISE—Municipal
See MUNICIPAL BOROUGH.

—— Parliamentary
See PARLIAMENT.

FREEHOLDER—Conveyance—Devise—Local Registration of Title Act—Parliamentary franchise - - - - - 381
See PARLIAMENT. 14.

GAME—Trespass in pursuit of—Evidence 12
See TRESPASS IN PURSUIT OF GAME.

GRAND JURY—*County cess—Application of surplus moneys arising from one barony to another—The Grand Jury* (*Ireland*) *Act*, 1836 (6 *&* 7 *Wm.* 4, *c.* 116, *s.* 145.] Under 6 & 7 Wm. 4, c. 116, s. 145, the Grand Jury is authorized to apply the surplus (if any) arising from one barony, after all liabilities thereon have been discharged, to meet undischarged liabilities of another barony or the county at large. At the ensuing assizes the amount of such surplus must be raised off the barony to whose liabilities it was applied, and must be replaced to the credit of

GRAND JURY—*continued.*
the barony whose surplus it was. *Re Murphy's Presentment* (*Co. Mayo Presentments*, 1893) [CR. CAS. RES. 199

—— Contractor—Repair of roads—Order for entry upon land - - - - - 81
See JUSTICES. 4.

—— Guaranteed dividend — Tramway — Arbitrators' certificate—Finality - 691
See TRAMWAY.

GUARANTEED DIVIDEND—Tramway
See TRAMWAY. [115, 691
WORKING EXPENSES.

HARBOUR COMMISSIONERS—Regulation of conduct and hire of boats—By-law requiring licenses to be taken out - 384
See BY-LAW.

HIGHWAY—Obstruction—Continuing offence
See JUSTICES. 3. [527

HOLIDAYS—Time for pleading - - 654
See TIME.

HOUSING OF WORKING CLASSES ACT—53 & 54 Vict. c. 70—Compulsory purchase—Leave to appeal - - - 181
See COMPULSORY PURCHASE.

IMPRISONMENT — Non-payment of fine — Licensing Act, 1872, ss. 3, 51 - - 363
See PENALTY.

IMPROVEMENT RATE—Personal tax— Deduction from rent—Lease - 49
See RATES.

IMPROVEMENTS — *Compensation for — Advances by Commissioners of Public Works—Claim of Commissioners against moneys awarded to tenant.*] A tenant from year to year of lands in the county of Clare applied for and obtained from the Commissioners of Public Works, under the 31st section of the Land Law (Ireland) Act, 1881, a loan of £375, to be expended in drainage and erecting farm offices; and executed a deed whereby he charged all his tenancy estate and interest in the lands with the payment to the Commissioners of the advances and interest. The tenant's interest was sold under a writ of *fi. fa.* to Brew and Glynn, who subsequently surrendered the tenancy to the landlord, and, on the 27th November, 1888, served a claim for compensation for improvements for £498 3*s.* 4*d.* The County Court Judge disallowed the claim. The Commissioners of Public Works, having obtained leave to intervene, appeared on the hearing of the appeal before the Land Commission, and claimed to be mortgagees of the compensation moneys. No claim was made by the Commissioners against the landlord or his estate. The Land Commission having ascertained that the claimants were entitled to £237 10*s.* compensation, it was *held* that the claim of the Commissioners of Public Works to have a charge on the amount of

IMPROVEMENTS—*continued.*
compensation awarded was unsustainable. *Brew and Glynn, Tenants; Stackpoole, Landlord* [Land Com. 193
—— Claim for—Set-off—Mesne rates—50 & 51 Vict. c. 33, s. 7 - - - 731
See Mesne Rates.
—— Exemption from rent in respect of—Fair rent fixed in lieu of redemption - 27
See Fair Rent. 4.
—— Lease—Clause of surrender — Covenant to deliver up premises and all buildings—Fair rent - - - - - 101
See Fair Rent. 3.
INHABITANT HOUSEHOLDER—Joint or sole occupation — Devise of qualifying premises - - - - - 372
See Parliament. 13.
—— Notice to quit—New tenancy not relating back
See Parliament. 4. [442
—— Occupation as tenant—Acceptance of one of several next-of-kin as tenant - 365
See Parliament. 12.
—— Temporary absence during repairs - 155
See Parliament. 6.
INSURANCE
See Policy of Insurance.
INTEREST—Disqualification for - 527
See Justices. 3.
INTESTACY—Next-of-kin—Occupation—Parliamentary franchise 285, 299, 312, 318,
See Parliament. 7–12. [339, 365
JOINT OCCUPATION—Next of kin of deceased tenant - 299, 312, 318, 339, 365
See Parliament. 8-12.
—— Qualifying premises devised subject to right of residence in another party - 372
See Parliament. 13.
JUDGMENT—By default—Computation of time—Holidays - - - - - 654
See Time.
—— More than six years old—Leave to issue execution - - - - - 683
See Execution.
—— Unsuccessful motion to set aside—Action of contract in which less than £20 is recovered—Costs of motion - 14
See Costs. 4.
JURISDICTION — Land Commission—Taking off file on consent agreement fixing fair rent - - - - - - 44
See Fair Rent. 2.
JUSTICES—*Committal for trial*—Certiorari.] The decision of Justices of the Peace, committing a defendant for trial, or admitting him to bail, under the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), sect. 15, cannot be brought up by *certiorari*. *Reg.* (*Blakeney*) v. *Justices of the County of Roscommon* - - - - - Q. B. 158
JUSTICES—*continued.*
2. —— *Contempt of Court—Arrest outside the Court for contempt committed in Court*—14 & 15 *Vict. c.* 93 (*Petty Sessions, Ireland, Act*, 1851), *s.* 9—12 *Vict. c.* 16, *s.* 1.] Where, at Petty Sessions, a contempt committed in Court is brought to the notice of the Justices there sitting, and, while the offender is still in Court, the Justices order that he be attached to answer there and then for such alleged contempt, the mere fact that the order so made is carried out after the offender, in order to evade arrest, has left the Court, is not sufficient to render his arrest illegal. *Mitchell* v. *Smith* [Q. B. 351
3. —— *Continuing offence—Obstruction of highway—Disqualification for interest.*] A person who had been convicted at Petty Sessions, in June, 1893, for obstructing the free passage of a road by "erecting" a barbed wire fence thereon, was afterwards convicted of four separate charges of obstructing, on the 7th, 14th, 21st, and 28th August, 1893, respectively, the free passage of the road, by "erecting and maintaining" a barbed wire fence thereon. The barbed wire fence was the same in both cases, the defendant not having removed it after the first conviction. It was sought to quash the later convictions, on the ground (*inter alia*) that the offences charged were identical with that for which the first conviction was had:—*Held*, that the convictions were good, the obstructing on each day being a separate offence. *W.*, one of the Justices who adjudicated, was a member of the Finance Committee of the county of Dublin, and also a cesspayer. The complainant was the district surveyor, an officer of the Grand Jury, having a statutory duty of reporting generally on the state of all roads, and the name and description of all persons by him prosecuted for any injury to any road, or any like offence, and the result of such prosecution, and generally on all matters and things which may be given to him in charge by the Finance Committee. There was evidence that the first prosecution was undertaken by him in obedience to a direction from the Finance Committee to take steps to have the barbed wire fence removed, but that the subsequent prosecutions were undertaken by him on his own responsibility, and that *W.*, when adjudicating in the cases, was not aware that any directions had been given to the complainant:—*Held*, that *W.* was not disqualified, either by his being a member of the Finance Committee, as that Committee could not be considered as being directly or indirectly the prosecutors, or by his being a cesspayer, even assuming that the costs of such a prosecution were to be paid out of the county funds. *Reg.* (*Ellis*) v. *Justices of the County of Dublin* [Q. B. 527
4. —— *Road contractor—Order authorizing road contractor to enter upon lands—Exceptions to be*

JUSTICES—*continued.*
negatived—Time to be limited—Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4. *c.* 116, *s.* 162.] An order of justices, made under 6 & 7 Wm. 4, c. 116, s. 162, authorizing a road contractor under the Grand Jury to enter upon lands for the purpose of taking gravel stones, &c., must show upon its face that the lands are not of the kinds excepted by the section, and should sufficiently limit the duration of the authority thereby given. *Fitzpatrick* v. *Pyne* (13 Ir. C. L. R. 32) discussed. *Reg.* (*Bentham*) v. *Justices of Dublin* (14 L. R. Ir. 443) discussed and distinguished. In applications under this section, where the procedure by summons under the Petty Sessions Act, 1851, is adopted, the order of the Justices is not the entry in the Petty Sessions Order Book, but the document which is issued to the contractor as his authority. *Reg.* (*Murphy*) v. *Justices of Wexford* Q. B. 81

—— Dublin Police Act (5 Vict. sess. 2, c. 24)—Nonpayment of penalty - - 363
See Penalty.

—— Illegal fishing—Appeal—Mitigation of statutory penalty - - - - 127
See Fishery Acts.

—— Licensing Acts.
See Licensing Acts.

LABOURERS—Subletting to—Rent paid in labour - - - - - - 573
See Bona fide Occupation. 1.

LAND AND SEA CARRIAGE—Contract, where entered into - - 208, 223
See Carriers.

LAND COMMISSION — Mandamus — *Land Law (Ireland) Act*, 1881, *s.* 48—*Refusal of Land Commission to state case for appeal — Question of law—Application to state a case for appeal, whether frivolous and vexatious.*] In 1878 *D.* had taken from *R.* a holding, containing 14a. 0r. 2p., under an agreement for the season, which stated the lands to be part of the town-parks of *M.*, at the rent of £56, and which contained an agreement not to sublet. In 1880 a second written agreement, identical in terms, was executed between the parties, for the season ending the 1st November, 1880. Since 1880 *D.* had remained in occupation, at the rent of £56; but no further agreement was executed. In October, 1887, the tenant served an originating notice to fix a fair rent, and the Sub-Commission fixed a fair rent at £30. The landlord appealed, stating in his notice of appeal two grounds—first, that the holding was a town-park, and, secondly, that the letting was one for temporary convenience. When the case came on for hearing before the Land Commission at Monaghan, counsel for the tenant was stating his case, when Bewley, J., intimated that the Land Commission had seen the premises, and that the *onus* lay upon the landlord of showing that the case was not

LAND COMMISSION—*continued.*
within the Act. Counsel for the landlord then proceeded to state his case, and gave evidence for the purpose of showing that the holding was a town-park. The hearing of the case took up the rest of the day, when the Court reserved judgment until the following morning. On the next day Bewley, J., commenced to deliver judgment when a second counsel for the landlord, who had not been present on the former day, asked leave to intervene. Bewley, J., refused leave until after the judgment was delivered. Judgment was then given, affirming the order of the Sub-Commission, and counsel for the landlord asked leave to appeal, stating that there was a question of law he was anxious to raise. Bewley, J. refused leave to appeal, but said he would state a case for the Court of Appeal on any question of law that might be sent in to them. A draft case was then prepared, raising three questions—(1) whether the holding was a town-park, as defined by the Land Law Act, 1881; (2) whether the tenant was a present tenant, as defined by the said Act; and (3) whether the holding was excluded from the said Act, as not being agricultural or pastoral in its character, but let to the tenant for his temporary convenience, and as an adjunct to his residence; and, on the 5th December, it came on to be settled before the Land Commission, and after hearing counsel on both sides, Bewley, J., refused to state a case, on the ground that the questions were questions of fact, or mixed questions of fact and law. That order was subsequently amended by another member of the Land Commission joining in the order, and giving, as a further ground for refusing the application, that it was frivolous and vexatious. The landlord having applied to the Queen's Bench for a *mandamus* to the Land Commission, directing them to give liberty to appeal, or to state a case for the opinion of the Court of Appeal, that Court refused the order:—*Held* (reversing the decision of the Queen's Bench, Barry, L.J., *dissentiente*), that a *mandamus* should issue to the Land Commission to hear and determine an application on the part of *R.* for leave to appeal or to have a case stated. *Reg.* (*Lord Rossmore*) v. *Irish Land Commission* [App. 394

—— Jurisdiction—Application to take fair rent agreement off file - - - 44
See Fair Rent. 2.

LAND LAW (IRELAND) ACTS—*Bona fide* occupation — Subletting to labourers — Triviality - - - - - 573
See Bona fide Occupation. 1.

—— *Bona fide* occupation—Tenant subletting to landlord—Eviction of sub-tenancy—Caretaker - - - - - - 41
See Bona fide Occupation. 2.

LAND LAW (IRELAND) ACTS—*continued.*
—— Eviction notice—Liability to mesne rates
See MESNE RATES. [731
—— Eviction notice—Parliamentary franchise
See PARLIAMENT. 2, 3. [434, 451
—— Fair rent—Agreement or declaration fixing—Consent to take same off file - 44
See FAIR RENT. 2.
—— Fair rent—Buildings—Lease—Special clause of surrender - - - - - 101
See FAIR RENT. 3.
—— Fair rent—In lieu of redemption—Fine—Improvements - - - - - 27
See FAIR RENT. 4.
—— Fair rent—Order fixing—Retrospective effect—Over-payments - - - - 24
See FAIR RENT. 1.
—— Holding not within Acts - - 579
See NON-AGRICULTURAL HOLDING.
—— Lands used as part of demesne—Holding not within Act of 1881 - - 279, 557
See DEMESNE LANDS.
—— Lease for three lives or 31 years, with covenant to renew for one life and for concurrent term of 21 years—Land Law Act, 1887, s. 1 - - - - - 238
See FAIR RENT. 5.
—— Pastoral holding - - - - - 465
See PASTORAL HOLDING.
—— Present tenant—Determination of middleman's tenancy by notice to quit - 108
See NOTICE TO QUIT.
—— Present tenant—*Status*, when acquired—Application—Subletting - - 480
See PRESENT TENANT.
—— Present tenant—Surrender - - 590
See SURRENDER.
—— Statement of case for Court of Appeal—Question of law - - - - - 394
See LAND COMMISSION.
—— Subletting—Triviality - - 573, 637
See BONA FIDE OCCUPATION. 1. SUBLETTING.
—— "Town"—What constitutes - - 473
See TOWN-PARK. 1
—— Town-park—*Onus* of proof - - 611
See TOWN-PARK. 2.
LANDLORD AND TENANT—Eviction notice—Parliamentary franchise 434, 451
See PARLIAMENT. 2, 3.
—— Improvements—Compensation for—Claim by Commissioners of Public Works 193
See IMPROVEMENTS.
—— Improvements—Eviction notice—Mesne rates
See MESNE RATES. [731
—— Land Law (Ireland) Acts
See LAND LAW (IRELAND) ACTS.
—— Lease
See LEASE.
LANDLORD AND TENANT—*continued.*
—— Next-of-kin of tenant dying intestate—Parliamentary franchise—Occupation [285, 299, 312, 318, 339
See PARLIAMENT. 7–11.
—— Notice to quit
See NOTICE TO QUIT.
—— Occupation as tenant—Parliamentary franchise 285, 299, 312, 339, 365, 434, 451
See PARLIAMENT. 2, 3, 7–11.
—— Order fixing fair rent—Over-payments—Deduction - - - - - - 24
See FAIR RENT. 1.
—— Redemption of Rent Act
See REDEMPTION OF RENT.
—— Rent—Action for—Specially indorsed writ
See SPECIALLY INDORSED WRIT. 1. [16
—— Surrender
See SURRENDER.
LEASE—Application to fix fair rent—Subletting—Present tenant - - - - 480
See PRESENT TENANT.
—— Covenant to renew—Land Law Act, 1887, s. 1 - - - - - - 238
See FAIR RENT. 5.
—— Covenant to repair—Action for breach of—Assignee—Third party - - 20
See THIRD PARTY.
—— Ecclesiastical—Sub-perpetuity—Redemption of rent - - - - - - 224
See REDEMPTION OF RENT.
—— Purpose of letting—User and character of holding—Ancient pasture - - 465
See PASTORAL HOLDING.
—— Surrender clause—Covenant to deliver up premises and all buildings—Fair rent 101
See FAIR RENT. 3.
—— Taxes, charges, and impositions—Deduction from rent—Improvement rate—Personal tax - - - - - - - 49
See RATES.
LICENSE—Of boats plying for hire—Harbour Commissioners—By-law - - - 384
See BY-LAW.

LICENSING ACTS—*Certificate for spirit grocer's license—Suitability of premises—Licensing (Ireland) Act*, 1874 (37 & 38 *Vict. c.* 69), *sect.* 9.] On an application to Justices at Petty Sessions for a certificate for a spirit grocer's license, under the Licensing (Ireland) Act, 1874, sect. 9, the Justices refused the application "on the ground of the unsuitability of the premises, from their locality being in the immediate neighbourhood of another public-house, and also close to a school and place of worship." On appeal to Quarter Sessions, the Chairman and Justices refused the application "on the ground of the unsuitability of the premises." On motion to make absolute a conditional order for writs of *certiorari* and *mandamus*:—*Held*

MUNICIPAL EXPENDITURE—*continued.*
Per Sir P. O'Brien, C.J., such ratepayer, as being specially aggrieved by misapplication of the rates, would be entitled at common law, and independently of the statute, to a writ of *certiorari* as of right. *Per* Madden, J., at common law, where a person comes forward to redress an individual grievance, the writ of *certiorari* issues as of right; where a person comes forward to assert a right in which a more or less numerous class of the public are interested, the issue of the writ is within the discretion of the Court. *Reg.* v. *Justices of Surrey* (L. R. 5 Q. B. 466) discussed. Under 34 & 35 Vict. c. 109 (amended by 35 & 36 Vict. c. 69. s. 4) the authority of the Local Government Board in regard to their auditor, when engaged in the audit of the accounts of municipal bodies in Ireland, is that solely of an appellate tribunal, to decide upon the lawfulness of reasons definitely brought before them by a person aggrieved by any decision of such auditor. *Reg.* (*Bridgeman*) v. *Drury* [Q.B. 489.

NEGLIGENCE—Damages for—Light Railway—Working expenses - - 115
See WORKING EXPENSES.

NEW TRIAL—Motion for—Number of counsel allowed—Discretion of taxing-master 242
See TAXATION OF COSTS.

NEXT-OF-KIN—Tenancy—Occupation entitling to parliamentary franchise 285, [299, 312, 318, 339, 365
See PARLIAMENT. 7–12.

NON-AGRICULTURAL HOLDING—*Land Law* (*Ireland*) *Act*, 1881, *section* 58, *sub-section* 1.] A holding consisted of one acre, situate on the South Circular-road, Dublin, within the municipal boundary. It had formerly been held by the same tenant, along with another acre of land, but the latter portion had been taken by another person, who had let it out as a receptacle for dust and refuse. The holding had been used for agricultural purposes:—*Held* (reversing the decision of the Land Commission), that the holding was not one to which the Land Law (Ireland) Act, 1881, applied. *Perry, Tenant; Farley, Landlord* [APP. 579

NOTICE TO QUIT—*Landlord and tenant—Sub-tenant from year to year in occupation—Determination of middle interest—Land Law* (*Ireland*) *Act*, 1881, *section* 15.] *D.*, who held an agricultural holding under *W.* as tenant from year to year, sublet the holding to *H.* as a yearly tenant. While *H.* was in occupation and a present tenant within the meaning of the Land Law (Ireland) Act, 1881, *W.* served a notice to quit and determined *D.*'s tenancy:—*Held*, that *H.* thereupon became tenant from year to year to *W.*, and entitled to fix the fair rent of the holding. *West, Landlord; Huggard, Tenant* - - APP. 108

NOTICE TO QUIT—*continued.*
—— Weekly tenancy—Summons for possession—New tenancy—Parliamentary franchise
See PARLIAMENT. 4. [442

OBSTRUCTION—Public highway—Continuing offence - - - - - - 527
See JUSTICES. 3.

OCCUPATION—A tenant—Parliamentary franchise 285, 299, 312, 318, 339, 365, 434,
See PARLIAMENT. 2, 3, 7–11. [451

—— Joint or sole 299, 312, 318, 339, 365, 372
See PARLIAMENT. 8–13.

—— Municipal franchise—Stall in market 346
See MUNICIPAL BOROUGH.

—— Occasionality—Premises taken to obtain vote - - - - - - 374
See PARLIAMENT. 5.

—— Of holding—Land Law Acts
See BONA FIDE OCCUPATION.

ORDER OF LAND COMMISSION—Fair rent—Relation back - - 24
See FAIR RENT. 1.

ORDERS GENERAL, 1891, 19th June—III., R. 6 - - - - - 16, 18
See SPECIALLY INDORSED WRIT. 1, 2.

—— XIV., R. 1 - - - - - - 16, 18
See SPECIALLY INDORSED WRIT. 1, 2.

—— XVI., R. 53 - - - - - 20
See THIRD PARTY.

—— XLII., Rr. 24, 25 - - - 683
See EXECUTION.

—— LXIV., R. 6 - - - - - 654
See TIME.

—— (1893) LXV., R. 3 - - - - - 14
See COSTS. 4.

—— —— Rr. 16, 64 (20) - - - 545
See COSTS. 2.

OVERPAYMENT—Rent—Order of Land Commission—Retrospective effect of—Deductions - - - - - - 24
See FAIR RENT. 1.

PARLIAMENT—*Registration of voters—Borough—Signature of claimant to notice of claim—Name on list of claimants—Jurisdiction of Revising Barrister.*] If a notice of claim be received by the Town Clerk in a borough, and the name of the claimant be duly inserted in the list of claimants, it is not competent to the Revising Barrister to inquire into the circumstances under which the claimant's signature was attached to the notice of claim. *M'Grorey* v. *Chambers* (*Brown's Case*) [APP. 129

2. —— *Registration of voters—Occupation as tenant—Eviction notice—Expiration of six months—Demand of possession—Summons for possession—Continuance in occupation without redeeming or paying rent—Land Law, Ireland, Act*, 1887, *s.* 7.] On June 1, 1892, *H.*, who was then the tenant of the qualifying premises but against whom his

PARLIAMENT—*continued.*
landlord had obtained an ejectment decree for non-payment of rent, was served with an eviction notice under section 7 of the Land Law (Ireland) Act, 1887. The six months expired, and in December, 1892, possession of the said premises was demanded, and a summons for possession served. No further proceedings were taken, and *H.*, without having redeemed or paid any rent for the qualifying premises, continued in occupation of them during the qualifying year:—*Held* (*diss.* Palles, C.B.), that *H.* was not entitled to the franchise. *Holland* v. *Graham* - App. 434

3. —— *Registration of voters—Occupation as tenant—Eviction notice—Expiration of six months—Demand of possession—Summons for possession—Continuance in occupation without redeeming or paying rent—Re-instatement—Land Law, Ireland, Act*, 1887, *sect.* 7.] The right to the franchise of tenants otherwise qualified, on whom eviction notices, under the 7th section of the Land Law, Ireland, Act, 1887, have been served, is preserved by the saving clause in that section, where, during the qualifying period, there has been no demand of possession made, summons for possession issued and served, nor any other step taken signifying dissent to the voters' occupation as statutory caretakers after the expiration of the eviction notice. *Kirkpatrick* v. *Beggan*; *Same* v. *Maguire*; *Charlton* v. *Dolan*; *Same* v. *Gilroy*; *Same* v. *Gallagher*; *Same* v. *Feely* - - - - App. 451

4. —— *Registration of voters—Occupation as tenant—Notice to quit—Weekly tenant—Summons for possession—New tenancy purporting to relate back to expiration of previous one.*] In order to compel him to pay off the arrears of his weekly rent, each of several weekly tenants of dwelling-houses was served with a notice to quit, which expired during the qualifying period. Each of the tenants continued in possession of his dwelling-house after the expiration of the notice to quit for a substantial period. While so over-holding each of the tenants was served with a summons for possession. In some of these cases before, and in others after, a decree for possession was obtained, a new contract of tenancy was made, whereby it was arranged that the several tenants should continue to hold upon the old terms, and that the new tenancy was to be deemed to have commenced in each case on the expiration of the old one. It was further agreed that each tenant should pay off the arrears of his rent:—*Held* (reversing the decision of the Recorder of Londonderry), that the new contract was not capable of relating back for the purpose of the franchise, and that therefore none of the weekly tenants were entitled to the franchise. *Holland* v. *Chambers* (*Devine's Case*) App. 442

5. —— *Registration of voters—Occasionality—Joint rated occupiers—Premises taken solely to obtain votes—Sole occupation—Occupation of sub-tenant or licensee.*] Prior to March, 1892, two sons lived with their father in premises of which he was the tenant, and which it became desirable to take down and rebuild. In March, 1892, it was arranged that the sons should become the joint tenants of other premises, and be jointly rated in respect of the same, in order to qualify themselves for the franchise. As soon as the arrangement was completed the father and the two sons moved into the premises, of which the sons thus became the tenants, and resided there till August, 1893, when all three moved back into the premises, of which the father was tenant, and which had been rebuilt in the interval. The sons paid the rent and poor-rates of the premises of which they were the tenants, but the father was surety for the payment of the rent, and paid all the household expenses of the establishment, including the maintenance of his two sons. The Revising Barrister held that the arrangement for obtaining the tenancy of the house in the names of the sons was not *bona fide*, and that the father was the sole occupier of the house, and disallowed the votes:—*Held* (reversing the Revising Barrister), that the sons were entitled to the franchise as joint rated occupiers of the premises of which they were tenants. *Mooney* v. *Chambers* [App. 374

6. —— *Registration of voters—Occupation—Temporary absence from house during repairs—Inhabitant householder.*] *H.'s* name appeared on the register of voters in a county, and was duly objected to. It was proved that he worked for an employer, by whom he was given, in addition to his wages, a house at a shilling a-week. During the qualifying period he had lived in two houses, living in one from the 2nd July to 22nd August, while there were alterations effected in the other. He only paid rent for one house during this period. There was no succession claim made:—*Held* (*diss.* Sir P. O'Brien, C. J.), that *H.* was not entitled to the franchise. *Held*, *per* Sir P. O'Brien, C. J., that the rent was paid in respect of the house that was repaired alone, that there was evidence that *H.* had a tenancy in, and had inhabited, this house all through, and that he was not to be disqualified by his temporary absence during the repairs. *Torish* v. *Henderson* - - - - App. 155

7. —— *Registration of voters—Occupation as tenant—Tenant dying intestate—Sole next-of-kin in occupation—Letters of administration.*] On the death intestate of the tenant of a house who had left Ireland, his father, who was his sole next-of-kin, and had been residing in the house, continued in occupation during the qualifying year, and paid the rent, without taking out letters of administration:—*Held*, that the father was entitled to be registered as an inhabitant householder. After the

PARLIAMENT—*continued.*
expiration of the qualifying period the father took out letters of administration to his son:—*Held*, that the letters did not relate back for the purposes of the franchise. *Holland* v. *Chambers* (*John Doherty's Case* - - - - - - - App. 285

8. —— *Registration of voters—Occupation as tenant—Tenant, father of claimant, dying intestate—Claimant accepted as tenant—Consent of other next-of-kin—Joint or sole occupation.*] The claimant's father had been tenant from year to year of the qualifying premises. He died intestate, leaving his widow and one son (the claimant) sole next-of-kin. The widow and the claimant continued to live on the farm during the qualifying period. The claimant had been accepted by the landlord as tenant. The Revising Barrister, on these facts being proved, allowed the case to stand for the attendance of the widow to prove that she had released her claim on the farm. She did not attend, and the Revising Barrister disallowed the vote, on the ground that the claimant was not in sole occupation. *Held* (*diss.* Fitz Gibbon, L. J.), that there was evidence to support the finding of the Revising Barrister, and that his decision should be affirmed. *Gormley* v. *Buchanan* - - - App. 299

9. —— *Registration of voters—Occupation as tenant—Tenant, father of claimant, dying intestate—Purchase of a farm by his widow out of his assets—Claimant accepted as tenant*—Devastavit—*Joint or sole occupation—Consent of other next-of-kin.*] The tenant of a farm died intestate, leaving a widow, a son, and a daughter. The widow sold the farm and purchased another holding, on which she and her son and daughter continued to reside. The widow had some years ago returned her son's name as the tenant, and he was so accepted by the landlord, and had fixed a fair rent in his own name. The mother stated that she had no claim on the farm, but that she was to get her support there:—*Held*, reversing the decision of the Revising Barrister, that the son was in occupation of the premises as tenant, and entitled to the franchise. *M'Keever* v. *Buchanan* - - - - - App. 312

10. —— *Registration of voters—Occupation as tenant—Tenant, father of voter, dying intestate—Voter accepted as tenant—Consent of other next-of-kin—Joint or sole occupation*—Onus *of proof.*] The father of the voter was the prior tenant of the qualifying premises. He died intestate in 1881, leaving his widow and the voter (his son) his only next-of-kin him surviving, and in occupation of the qualifying premises. In 1882 the voter fixed by agreement the fair rent of the holding under the Land Law (Ireland) Act, 1881, and was thenceforth treated as tenant by the landlord. The voter stated that he was accepted by the landlord as tenant with his mother's consent. The mother all along lived on the farm, and was maintained by its

PARLIAMENT—*continued.*
produce. She was not examined to prove that she consented to the change in the tenancy, nor was any evidence given that she had surrendered her rights under her husband's intestacy, nor, on the other hand, was evidence produced by the objector to show that she made any claim upon the farm. The Revising Barrister held that the mother had not relinquished her claim on the qualifying premises, that there was in fact a joint beneficial occupation by the voter and his mother, and accordingly struck the voter's name off the register:—*Held* (*diss.* Fitz Gibbon, L. J.), that there was evidence on which the Revising Barrister might so find, and that his decision should be affirmed. *Per* Fitz Gibbon, L. J.: The tenant and rated occupier of qualifying premises does not lose the franchise upon proof of the simple fact that someone else lives on the premises, who appears *prima facie* to have an equitable claim upon the assets of a deceased tenant of the premises, when there is no evidence to show that that person has made any claim. *Brown* v. *Buchanan* - - - - - App. 318

11. —— *Registration of voters—Occupation as tenant—Tenants—Grandfather of claimant dying intestate—Consent of other next-of-kin—Claimant accepted as tenant.*] The claimant's grandfather was tenant of the qualifying premises. He died many years ago. No personal representation to him was taken out, but his two sons (claimant's father and uncle) remained in occupation of the premises, the claimant's father being treated as the tenant by the landlord. On his father's death the claimant was accepted as tenant by the landlord. During the qualifying period the claimant's uncle and the next-of-kin of the claimant's father all resided together on the premises. It was alleged that the claimant's father made a will, but no probate of same was obtained, nor were letters of administration to his estate taken out. The Revising Barrister, on these facts being proved, allowed the case to stand for the attendance of the claimant's uncle and his father's other next-of-kin, to prove that they had released their claims or had assented to any change of tenancy. None of them attended, and no further evidence was given. The Revising Barrister held that the grandfather died intestate, that the uncle still continued to occupy the premises as one of his next-of-kin, without having released his claim on the farm. He also held he had not sufficient legal evidence to enable him to hold that the next-of-kin of the claimant's father (other than the claimant himself) had released their interest or ceased to occupy the farm as such next-of-kin jointly with the claimant as joint occupiers:—*Held*, that the decision of the Revising Barrister should be affirmed. *Arbuckle* v. *Buchanan* - - - - - App. 339

12. —— *Registration of voters—Occupation as*

PARLIAMENT—*continued.*

tenant—Tenant leaving several next-of-kin on his death intestate—Occupation by next-of-kin—Acceptance of one as tenant by landlord—Joint or sole occupation.] The tenant of the qualifying premises died intestate in 1856, leaving a widow, two sons, and two daughters, his next-of-kin, in occupation. No administration was taken out to the father. The widow paid the rent for some years and was treated as tenant by the landlord. She died intestate. No administration was taken out to her, but her four children continued in occupation of the premises, the eldest son paying the rent and getting the receipts in his own name. In 1876 the eldest son assigned his interest to his brother, on terms that he should be supported on the premises. The eldest son died some years ago, but he had been living on the premises until his death. The second son, after the assignment from his brother, paid the rent, and was treated by the landlord as the tenant, but his two sisters continued to live, as they had previously done, with him on the premises. No evidence was offered that they had abandoned their claims on the assets of which their father and mother had died in possession:—*Held* (affirming the decision of the Revising Barrister), FitzGibbon, L.J., *diss.*, that the second son was not entitled to the franchise as inhabitant householder in respect of the premises. *Thompson* v. *Buchanan and Torish* - - - - - App. 365

13. —— *Registration of voters—Qualifying premises devised by tenant to his son, subject to right of widow to reside therein—Joint or sole occupation.*] The deceased yearly tenant of a house and farm devised his tenancy to his son, giving, by his will, a right to his widow to reside in the house, so long as the son was unmarried. The son was still unmarried, and the widow was still residing in the house. In all other respects the son was qualified as an inhabitant householder in respect of the premises:—*Held* (affirming the decision of the Revising Barrister), that the son was entitled to the franchise. The mere fact that another person has an incorporeal right to reside in the house of which he is tenant does not disqualify for the franchise as inhabitant householder an otherwise qualified tenant of the house. *Torish* v. *Love.* [App. 372

14. —— *Registration of voters—Rated £5 freeholders—Local Registration of Title Act* (54 & 55 *Vict. c.* 66, *s.* 25)—*Operation of conveyance, but not of a devise, postponed till registration—Costs of registry appeal partly successful.*] *O.* was grantee of freehold lands of the qualifying value, to which the Local Registration of Title Act applied, under a conveyance executed before the commencement of the qualifying period. His title was not registered:—*Held*, that the property in the land did not pass until registration under the Act, and that

PARLIAMENT—*continued.*

therefore *O.* was not entitled to the franchise as a £5 rated freeholder. *S.* was devisee of freehold lands of the qualifying value, to which the Local Registration of Title Act applied, under the will of a testator who died before the commencement of the qualifying period. His title was not registered:—*Held*, that the operation of a devise of lands, the title to which is registrable, is not postponed until registration, and that therefore *S.* was entitled to the franchise as a £5 rated freeholder. The cases of the two claimants having been consolidated into one Registry Appeal, and the objector having been successful in his appeal as to one claimant, no costs were given to either party. *Torish* v. *Orr and Smith* - App. 381

15. —— *Registration of voters—Rates—Owner or tenant quitting without paying rate—Incoming owner or tenant paying portion of rate proportionate to period of his occupation—Resolution of Guardians—53 & 54 Vict. c.* 30, *s.* 2—*Parliamentary franchise.*] The qualifying premises had been in the occupation of a tenant, who quitted them during the period for which the poor-rate was made without paying the poor-rate, or any portion thereof. The Board of Guardians passed no resolution in his relief. The incoming tenant, who succeeded him in May, 1892, paid, before July, 1893 a share of the poor-rate proportionate to the period from the commencement of his occupation to the end of the current rating year, and also the entire rate struck on the 29th November, 1892:—*Held*, (*diss.* Palles, C.B.), that the relief granted to the incoming tenant by sub-sect. 2 of sect. 2 of 53 & 54 Vict. c. 30, was not conditional on the Board of Guardians having taken the steps authorized by sub-sect. 1 of the same section, in case of an outgoing tenant who quitted the premises, leaving the rate unpaid, and that therefore the incoming tenant had paid all the rates by him payable up to the 1st January, 1893, and was entitled to the franchise:—*Per* Palles, C.B. The incoming tenant remains liable to the entire rate payable in respect of the premises, except in cases where the Board of Guardians have exercised the power conferred on them by sub-sect. 1, and therefore the claimant had not paid all the rates by him payable up to the 1st January, 1893, and should not be admitted to the franchise. *Riddall* v. *Quigley* - - - - - App. 144

PARTICULARS—Special indorsement 16, 18
See Specially Indorsed Writ. 1, 2.

PASTORAL HOLDING—*Land Law* (*Ireland*) *Act*, 1881, *s.* 58—*Holding let to be used mainly for the purpose of pasture—Ancient pasture—User and character of the holding—Lease silent as to purpose.*] Lands were demised to the tenant in 1871 by a lease which was silent as to the purpose of the letting, and contained no restrictive

PASTORAL HOLDING—*continued.*
covenants, except that the lessee would not alien or build cabins on the holding without the lessor's consent. Owing to its user prior to the date of the lease the greater part of the holding was, at the date of the lease, ancient pasture. Since the date of the lease no portion of the lands had been tilled by the tenant. The lands were situated in a grazing district, and were not equipped for tillage, having only a herd's house, and no other buildings. Evidence was given that a considerable portion of the lands was capable of being tilled, but that pasture would be the more profitable user:—*Held*, that the letting was made mainly for the purpose of pasture. *M'Cormick, Tenant; Loftus, Landlord* - - - - - - - APP. 465

PENALTY—*Licensing Act*, 1872, *sects.* 3, 51—*Non-payment of penalty—Imprisonment—Distress—Warrant—Dublin Police Act* (5 *Vict. sess.* 2, *c.* 24.)] A person was convicted under the Licensing Act, 1872, section 3, for selling porter without a license, and fined £25. Upon non-payment of the fine a magistrate issued a warrant to a constable to distrain the defendant's goods, and in default of distress to lodge the defendant in prison to be imprisoned for two calendar months, unless the fine be sooner paid:—*Held*, that the imprisonment was legal. *In re Brown* - - Q. B. 363

—— Fishery Acts—Mitigation - - 127
See FISHERY ACTS.

PETTY SESSIONS—Contempt—Arrest outside court - - - - - - 351
See JUSTICES. 2.

PHARMACY ACTS—Selling poisons - 8
See POISON.

PLEADING — Embarrassment — Specially indorsed writ - - - - 18
See SPECIALLY INDORSED WRIT. 2.

—— Time for—Holidays - - - 654
See TIME.

POISON—*Selling or keeping open shop for retailing—Pharmacy* (*Ireland*) *Act*, 1875 (38 & 39 *Vict. c.* 57), *section* 30—*Pharmacy* (*Ireland*) *Act*, 1875, *Amendment Act*, 1890 (53 & 54 *Vict. c.* 48), *section* 15.] The offence of selling or keeping open shop for the sale of poisons under the Pharmacy (Ireland) Act, 1875, section 30, is not repealed or affected by the enactment of the Amendment Act, section 15. *M'Gann, Appellant; Kelly, Respondent* - - - - - - - Q. B. 8

POLICY OF INSURANCE—Arbitration clause—Adjustment of loss - - 723
See ARBITRATION.

PRACTICE — Appeal — Housing of Working Classes Act, 1890 - - - 181
See COMPULSORY PURCHASE.

PRACTICE—*continued.*
—— Costs — Action of contract — Unsuccessful motion by defendant—Amount recovered less than £20 - - - - 14
See COSTS. 4.

—— Costs—Action of trespass involving question of title—Small damages exceeding limit within which certificate is required — Number of counsel allowed - 76
See COSTS. 3.

—— Costs—New trial motion—Number of counsel allowed—Discretion of taxing-master
See TAXATION OF COSTS. [242

—— Costs—Setting off between successful and unsuccessful defendants - - 545
See COSTS. 2.

—— Execution—Leave to issue—Judgment more than six years old—Notice of motion
See EXECUTION. [683

—— Special indorsement — Writ of summons—Particulars - - - - 16, 18
See SPECIALLY INDORSED WRIT. 1, 2.

—— Staying proceedings — Action on fire policy—Arbitration clause - - 723
See ARBITRATION.

—— Staying proceedings—Administration action
See ADMINISTRATION ACTION. [652

—— Third party - - - - - - 20
See THIRD PARTY.

—— Time for pleading—Holidays - 654
See TIME.

—— Writ of summons — Excessive claim for costs—Setting aside - - - 682
See COSTS. 1.

PRESENT TENANT — *Land Law* (*Ireland*) *Act*, 1887—*Lessee—Subletting*—"*Application.*"] A lessee, whose lease contained no covenant restraining subletting, served an originating notice under sect. 1 of the Land Law (Ireland) Act, 1887, to be deemed a present tenant, and to have a fair rent fixed, and afterwards made a subletting. Subsequently the Land Commission made an order that he be deemed a tenant of a present ordinary tenancy, and fixed a fair rent:— *Held*, that the subletting was lawful. *Smith* v. *Moore* (32 L. R. Ir. 129) followed. *Semble*, that a lessee serving an originating notice, under section 1 of the Land Law (Ireland) Act, 1887, does not acquire the *status* of a present tenant until the hearing by the Court of the application, so as to invalidate a subtenancy created in the interval between the serving of the notice and the hearing. *Johnson* v. *Egan* - - - - - - Q.B. 480

—— Determination of middleman's interest by notice to quit - - - - 108
See NOTICE TO QUIT.

—— Surrender—Land Law (Ireland) Act, 1881, s. 20 - - - - - - 590
See SURRENDER.

PRINCIPAL AND AGENT
See AGENT.

RAILWAY — Baronial guarantee — Arbitrators' certificate - - - - - 691
See TRAMWAY.

—— Baronial guarantee — Working expenses — Damages for negligence - - 115
See WORKING EXPENSES.

—— Land and sea carriage — Contract, where entered into - - - 208, 223
See CARRIERS.

RATES—*Landlord and tenant—Rent "including all taxes, charges, and impositions" "payable out of the premises"—Liability to local "improvement rate"—Limerick Improvement Act*, 1853 (16 & 17 *Vict. c. cxciv.*)—*The Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34).] Under a lease of premises in the borough of Limerick, made in 1854, the *reddendum* stated the rent as £9 15*s.*, "including all taxes, charges, and impositions whatsoever," the lessor covenanting to pay "all taxes, charges, and other impositions which may become due and payable out of the said demised premises":—*Held*, following *Palmer* v. *Power* (4 Ir. C. L. R. 191), that the lessee was not entitled to deduct the amount of the local "*improvement rate*" levied under the Limerick Improvement Act, 1853, and the Towns Improvement Clauses Act, 1847, such rate being a personal tax. *Palmer* v. *Power* (4 Ir. C. L. R. 191) and *Barcroft* v. *Welland* (12 L. R. Ir. 35). considered. *Gloster* v. *Murphy* - - - - - - Q. B. 49

—— Poor-rate—Incoming tenant paying apportioned part—Resolution of Guardians
See PARLIAMENT. 15. [144

REDEMPTION OF RENT—54 & 55 *Vict. c.* 57, *s.* 1—"*Fee-farm grant*"—*Meaning of*—*Church Temporalities Acts* (3 & 4 *Wm.* 4, *c.* 37; 4 & 5 *Wm.* 4, *c.* 90; 6 & 7 *Wm.* 4, *c.* 99)—*Sub-perpetuity grant.*] A sub-perpetuity grant, made under the Church Temporalities Acts, is a fee-farm grant within the meaning of the Redemption of Rent (Ireland) Act, 1891. *Hamilton, Grantor; Casey, Grantee* - - - LAND COM. 224

—— Fair rent—Fine—Improvements - 27
See FAIR RENT. 4.

REGISTRATION OF TITLE—Conveyance—Devise - - - - - - 381
See PARLIAMENT. 14.

REGISTRY APPEAL—Costs - - 381
See PARLIAMENT. 14.

RENT — Action for—Order fixing fair rent—Over-payments - - - 24
See FAIR RENT. 1.

—— Action for—Specially indorsed writ 16
See SPECIALLY INDORSED WRIT. 1.

—— Redemption of - - - -
See REDEMPTION OF RENT.

ROAD—Grand jury contractor—Order for entry upon land - - - - - 81
See JUSTICES. 4.

SALE OF FOOD—Butter exposed for sale in bulk — Inspector — Right to purchase sample - - - - - - 78
See BUTTER.

SALE OF LAND—Contract—Name of vendor
See VENDOR AND PURCHASER. [657, 662

—— Under *fi. fa.*—Want of title - 61, 648
See SHERIFF.

SAMPLE—Sale of Food and Drugs Act - 78
See BUTTER.

SET-OFF—Costs of successful and unsuccessful defendants - - - - - 545
See COSTS. 2.

SHERIFF—*Sale under writ of fi. fa—Tenancy from year to year—Sale of judgment debtor's "chattel interest (if any)"—Sale of a speculation—Effect of existence of outstanding legal mortgage—Notice—Deposit paid—"Failure of consideration."*] A sheriff, under a writ of *fi. fa.*, seized and set up for sale "the chattel interest (if any)" of an execution-debtor in a tenancy from year to year, giving full notice to intending purchasers of the fact that it was alleged that there was a legal mortgage thereon outstanding, but without inquiring further into the existence or validity of such alleged mortgage. It subsequently was proved that the mortgage was a valid and legal one. The purchaser rescinded before conveyance, and brought an action to recover the amount of his deposit, as paid upon a consideration that had wholly failed:—*Held* (affirming the Queen's Bench Division), that the sheriff sold a speculation merely, and that the plaintiff was not entitled to recover. *Griffin* v. *Caddell* (Ir. R. 9 C. L. 488) and *Kearney* v. *Ryan* (2 L. R. Ir. 61) discussed. *Ronan* v. *King* [Q. B. 61; APP. 648

SHOP—Stall in market—Municipal franchise
See MUNICIPAL BOROUGH. [346

SIGNATURE—Claim by voter—Name on list
See PARLIAMENT. 1. [129

SOLICITOR—Lien—Setting off costs - 545
See COSTS. 2.

—— Special agreement as to remuneration—Attendance in Dublin - - - 118
See COSTS. 5.

SPECIALLY INDORSED WRIT—*Practice—R. S. C., Order III., Rule* 6; *Order XIV., Rule* 1.] In a special indorsement of a writ, under Order III., Rule 6, it is essential that the dates at which the items mentioned in the particulars became payable should be set out. *Quære*—How far is a special indorsement on a writ of summons subject to the rules governing statements of claim? The application in this country of the principles laid down in *Casey* v. *Helyer* (17 Q. B. Div. 97) mooted. *Beaufort* v. *Ledwith* Q. B. 16

SPECIALLY INDORSED WRIT—*continued.*
2. —— *Practice—R. S. C.*, 1891, *Order XIV., Rule* 1—*Embarrassing pleading.*] In an action by the indorsee for a cheque against drawer and indorser, the mere setting out a copy of the cheque, without more does not constitute a special indorsement of the writ of summons, entitling the plaintiff to move for judgment, under Order XIV., Rule 1. *Northern Banking Company (Limited)* v. *Bailey and Moore* - WARREN, J., for Q. B. 18
SPIRIT GROCER—License—Certificate—Suitability of premises - - - - 246
See LICENSING ACTS.
STALL—Market—Municipal franchise - - 346
See MUNICIPAL BOROUGH.
STATUTE OF LIMITATIONS
See LIMITATIONS, STATUTE OF.
STATUTES:—
27 Geo. 3 (Ir.) c. 35—Preservation of Game, s. 10
See TRESPASS IN PURSUIT OF GAME. [12
3 & 4 Wm. 4, c. 37—Church Temporalities 224
See REDEMPTION OF RENT.
4 & 5 Wm. 4, c. 90—Church Temporalities 224
See REDEMPTION OF RENT.
6 & 7 Wm. 4, c. 99—Church Temporalities 224
See REDEMPTION OF RENT.
6 & 7 Wm. 4, c. 116—Grand Juries, s. 145 199
See GRAND JURY.
—— s. 162 - - - - - - - - 81
See JUSTICES. 4.
3 & 4 Vict. c. 108—Municipal Corporations, s. 30
See MUNICIPAL BOROUGH. [346
5 Vict. sess. 2, c. 24—Dublin Police - 363
See PENALTY.
10 & 11 Vict. c. 34—Towns Improvement Clauses
See RATES. [49
12 Vict. c. 16—Justices of the Peace, s. 1 351
See JUSTICES. 2.
13 & 14 Vict. c. 69—Parliamentary Voters, s. 1
See PARLIAMENT. 8, 9. [285, 299
13 & 14 Vict. c. 88—Fisheries, s. 53 - 127
See FISHERY ACTS.
14 & 15 Vict. c. 93—Petty Sessions, s. 9 351
See JUSTICES. 2.
—— s. 15 - - - - - - - - 158
See JUSTICES. 1.
16 & 17 Vict. c. 113—Common Law Procedure, s. 243 - - - - - - 14
See COSTS. 4.
16 & 17 Vict. c. cxciv.—Limerick Improvement
See RATES. [49
17 & 18 Vict. c. clxxvii.—Londonderry Port and Harbour, s. 26 - - - 384
See BY-LAW
19 & 20 Vict. c. 102—Common Law Procedure, s. 14 - - - - - - 723
See ARBITRATION.
32 & 33 Vict. c. 92—Fisheries, s. 16 - 127
See FISHERY ACTS.
STATUTES—*continued.*
33 & 34 Vict. c. 46—Irish Land, ss. 4, 21 193
See IMPROVEMENTS.
34 & 35 Vict. c. 109—Local Government, ss. 11–13
See MUNICIPAL EXPENDITURE. [489
37 & 38 Vict. c. 69—Licensing, s. 9 - 246
See LICENSING ACTS.
—— ss. 3, 51 - - - - - - - 363
See PENALTY.
38 & 39 Vict. c. 57—Pharmacy, s. 30 - - 8
See POISON.
38 & 39 Vict. c. 63—Sale of Food and Drugs, s. 17 - - - - - - 78
See BUTTER.
40 & 41 Vict. c. 56—County Officers and Courts, s. 76 - - - - - - 8
See POISON.
42 & 43 Vict. c. 30—Sale of Food and Drugs, s. 5
See BUTTER. [78
44 & 45 Vict. c. 49—Land Law, s. 8, sub-s. 1 27
See FAIR RENT. 4.
—— —— sub-s. 6 - - - - - 44
See FAIR RENT. 2.
—— s. 15 - - - - - - - 108
See NOTICE TO QUIT.
—— s. 20 - - - - - - - - 590
See SURRENDER.
—— s. 48 - - - - - - - 394
See LAND COMMISSION.
—— s. 51 - - - - - - - - 24
See FAIR RENT. 1.
—— s. 57 - - - - - - - - 41
See BONA FIDE OCCUPATION. 2.
—— s. 58 - - 279, 465, 473, 557, 579, 611
See DEMESNE LANDS.
NON-AGRICULTURAL HOLDING.
PASTORAL HOLDING.
TOWN-PARK. 1, 2.
46 & 47 Vict. c. 43,—Tramways and Public Companies, s. 4 - - - - - 115
See WORKING EXPENSES.
—— s. 6 - - - - - - - - 691
See TRAMWAY.
50 & 51 Vict. c. 33—Land Law, s. 1 101, 238, 480
See FAIR RENT. 3, 5.
PRESENT TENANT.
—— s. 4 - - - - - - 573, 637
See BONA FIDE OCCUPATION. 1.
SUBLETTING.
—— s. 5 - - - - - - - - 24
See FAIR RENT. 1.
—— s. 7 - - - - - 41, 434, 451, 731
See BONA FIDE OCCUPATION. 2.
MESNE RATES.
PARLIAMENT. 2, 3.
53 & 54 Vict. c. 30—Poor Law, s. 2 - 144
See PARLIAMENT. 15.
53 & 54 Vict. c. 48—Pharmacy, s. 15 - 8
See POISON.

STATUTES—*continued.*
53 & 54 Vict. c. 70—Housing of Working Classes. Sched. II., Art. 26 - - - 181
See COMPULSORY PURCHASE.
54 & 55 Vict. c. 57—Redemption of Rent, s. 1
See FAIR RENT. 4. [27, 224
REDEMPTION OF RENT.
54 & 55 Vict. c. 66—Local Registration of Title, s. 25 - - - - - - 381
See PARLIAMENT. 14.
STATUTORY POWERS—Harbour Commissioners—By-law - - - 384
See BY-LAW.
STAYING PROCEEDINGS—Pending administration action - - - 652
See ADMINISTRATION ACTION.
—— Policy of fire insurance — Arbitration clause - - - - - - 723
See ARBITRATION.

SUBLETTING—*Landlord and tenant — Land Law (Ireland) Act, 1887, sect. 4 — Triviality.*] Whether a subletting is "trivial" within the meaning of section 4 of the Land Law (Ireland) Act, 1887, must be decided on all the circumstances of the case in which it is raised. It is a question of degree, into the determination of which the relative proportions existing between the size and rent of the subletting and the size and rent of the holding enter largely as elements, though not as absolute tests. There was, without the landlord's consent, sublet an outlying portion of the tenant's holding, in respect of which there was no separate rating, though there was a house upon it in which the sub-tenant resided. The sub-tenant had been for forty-six years in occupation as tenant from year to year. The subletting consisted of 4A. 0R. 9P.; the holding consisted of 161A. 0R. 6P.; the rent of the sub-tenancy was £7; the rent of the holding was £204 18*s.* 4*d.* The house on the sublet portion was a poor structure. The quality of the land sublet was relatively inferior to that of the bulk of the holding:—*Held*, that the subletting was "trivial" within the meaning of section 4 of the Land Law (Ireland) Act, 1881, and that the tenant was entitled to fix a fair rent. *Ward, Tenant; Corballis (Trustee of), Landlord* APP. 637

—— By tenant to landlord—Eviction of sub-tenancy—Caretaker - - 41
See BONA FIDE OCCUPATION. 2.
—— Determination of middleman's tenancy by notice to quit—Land Law Act, 1881, s. 15 - - - - - - 108
See NOTICE TO QUIT.
—— Service of originating notice to fix fair rent — Present tenant — *Status*, when acquired - - - - - 480
See PRESENT TENANT.
—— To labourers—Triviality - - 573
See BONA FIDE OCCUPATION. 1.
SUB-PERPETUITY—Ecclesiastical lease—Redemption of rent - - - 224
See REDEMPTION OF RENT.
SUMMARY JURISDICTION — Justices — Road contractor—Order for entry upon land - - - - - - 81
See JUSTICES. 4.
—— Justices — Trespass in pursuit of game — Evidence - - - - 12
See TRESPASS IN PURSUIT OF GAME.
SURCHARGES — Municipal accounts — Local Government Board auditor - 489
See MUNICIPAL EXPENDITURE.
SURPLUS—Grand Jury Cess - - 199
See GRAND JURY.

SURRENDER—*Landlord and tenant—Land Law (Ireland) Act, 1881, sect. 20—Present tenant—Surrender of present tenancy—Future tenant—Resumption of possession by landlord—Determination of tenancy—Reverter.*] At the time of his death, in 1881, *C.* was tenant, under the same landlord, of two farms—*T.*, containing 61 acres (Irish), subject to a rent of £67 10*s.*, and *M.*, containing 37 acres (Irish), subject to a rent of £31 19*s.* 6*d.* On *C.*'s death *T.* and *M.* passed to his widow, who retained possession of *T.*, and put *C.*'s brother in possession of *M.* In 1884 the landlord recovered possession of *M.* for non-payment of rent. In 1885 *C.*'s widow signed a proposal to become tenant of her "old holding" *T.*, together with 10 acres (Irish) of *M.*, "as one holding," subject to a bulk rent of £75. This proposal was accepted by the landlord, and *C.*'s widow went into possession of the additional 10 acres without giving up possession of *T.* to the landlord, and she thenceforth paid the bulk rent of £75. *C.*'s widow served an originating notice, seeking to fix the fair rent of all the lands comprised in the proposal. The Sub-Commission struck the 10 acres (Irish) of *M.* out of the notice, and fixed a fair rent on T. The Land Commission affirmed this order of the Sub-Commission:—*Held* (affirming the decision of the Land Commission), that on the terms of the proposal, and under the circumstances in which it was made, the tenant did not intend to surrender her "old holding"; that in the absence of such intention the "old holding" had not been surrendered; that in making and accepting the proposal the two parties were not *ad idem*; that therefore there was no new contract creating a future tenancy, and accordingly the tenant was entitled to fix the fair rent of *T.*, and was liable in use and occupation for the 10 acres (Irish) of *M.* *Semble*, without resumption of possession by the landlord, a present tenancy may be determined by a surrender implied by reason of the tenant accepting a new estate inconsistent with such present tenancy. *M'Donnell* v. *Blake* (28 L. R. Ir. 395) explained. *Jackson* v.

SURRENDER—*continued.*
Hagan (28 L. R. Ir. 326) dissented from. *Conroy, Tenant; Marquis of Drogheda, Landlord* App. 590
—— Special clause in lease—Fair rent—Buildings *See* Fair Rent. 3. [101

TAXATION OF COSTS—*Practice—Party and party—Third counsel on new trial motion—Action involving questions of importance, though brought to recover small claim—Discretion of taxing-officer.*] In an action to recover £20 the defendant, who pleaded fraud, obtained a verdict. The taxing-master allowed the costs of three counsel upon a motion to set aside the verdict and enter a verdict and judgment for the plaintiffs, or for a new trial, certifying that he did so having regard to the nature of the case and the complicated and important questions involved. The Court (Palles, C.B., and Andrews J.; *diss.* Murphy, J.) declined to interfere with the discretion of the taxing-master in respect of such allowance. *Aaron's Reefs (Limited)* v. *Twiss* - - - Ex. 242
—— Action of contract in which less than £20 is recovered—Costs of unsuccessful motion to set aside judgment - - - 14 *See* Costs. 4.
—— Agreement for special remuneration—Attendance of country solicitor in Dublin 118 *See* Costs. 5.
—— Setting off costs - - - - 545 *See* Costs. 2.
—— Trespass involving title to land—Small damages—Three counsel - - 76 *See* Costs. 3.

TENANCY FROM YEAR TO YEAR—Executor in possession without proving will—Statute of Limitations - 1 *See* Limitations, Statute of.
—— Land used as demesne - - 279, 557 *See* Demesne Lands.
—— Notice to quit—Sub-tenant—Land Law Act, 1881, s. 15 - - - - 108 *See* Notice to Quit.

THIRD PARTY—*Practice—Order* (*S. C. Ir.*, 1891) *XVI., Rule* 53.] In an action against the personal representatives of a deceased lessee on a covenant to repair in the lease, the defendant having obtained leave to serve a third party notice on an assignee of the lease, applied for directions under Order XVI., Rule 53:—*Held*, that as the third party was not liable for any breach of covenant prior to the assignment, the plaintiff had reasonable grounds for objecting to the question of the liability to indemnify the defendant for subsequent breaches being tried in the action, and that the third party should be dismissed. If the third party objects, it is unnecessary for him to serve notice to be dismissed, as the Court has power to dismiss him on the hearing of the application for directions. *Waterford Turkish Baths Co.* v. *Barter* (17 Ir. L. T. R. 61) applied. *Greville* v. *Hayes* [Ex. 20

TIME—*Practice—Holidays—Time for pleading—Judgment by default—R. S. C. Ir., Order LXIV., R.* 3.] The time for appearing to a specially indorsed writ expired on the 23rd March, on which, being Good Friday, the offices of the Court were closed, and they did not re-open until the 28th, on which day an appearance was entered:—*Held*, that the time for delivering a statement of defence did not begin to run until the 28th. *M'Kibbin and Cordukes* v. *M'Clelland* - - Ex. 654

TITLE—Action of trespass involving—Allowance of third counsel - - 76 *See* Costs. 3.

TOWN-PARK — *Land Law (Ireland) Act*, 1881, *s.* 58—*Accommodation land—Town-park—"Town."*] Whether a place is a "town," so as to constitute one of the statutory requisites for making a holding in its neighbourhood a "town-park," depends on whether it can be fairly described in ordinary language as a "town," and whether there are living in the place people who want land for their own accommodation, and who are willing to pay for it more than its ordinary value:—*Archer, Tenant; Earl of Caledon, Landlord* - - - - - - App. 473

2. —— *Land Act*, 1881, *s.* 58—Onus *of proof—Evidence of increased value—Accommodation land.*] In 1855 the landlord, in consideration of *M.* agreeing to build a house in "the town of Dundrum," agreed to demise to *M.*, as soon as the house was built, the plot whereon it stood, for a term of three lives or ninety-nine years, and also a plot of 7 acres, as a "town-park," to be allotted to *M.*, and to be held with the house at a rent of 30*s.* an acre, for a term of thirty-one years. *M.* built the house, and thereupon, in January, 1860, the landlord executed to him a lease of the premises in Dundrum, to hold for the term agreed upon; and in June, 1860, the landlord executed a lease demising to *M.* 7 acres and 35 perches, situated about half-a-mile from Dundrum, for the term and at the rent agreed upon. This latter was an ordinary agricultural lease, and on its expiration *M.*'s widow, who had succeeded *M.* as tenant, continued to hold on as tenant from year to year. At the date of the agreement *M.* did not live in Dundrum, but he subsequently came to reside there, and till his death carried on the business of publican in that place. His widow continued to live in Dundrum, and kept on his business. She served an originating notice to fix a fair rent of the 7 acres. The landlord offered no evidence that the holding bore an increased value as accommodation land, over and above its ordinary letting value as a farm, save a general statement to that

TOWN-PARK—*continued.*
effect by his agent:—*Held* (reversing the decision of the land Commission), that the *onus* of proving that the holding bore an increased value as accommodation land, over and above its ordinary letting value as a farm, lay upon the landlord, and that as this *onus* was not discharged, the holding, which was an agricultural holding, was not excepted from the Land Act of 1881. *Archer* v. *Caledon* ([1894] 2 I. R. 473) explained. *Boyle* v. *Foster* (30 L. R. Ir. 623) distinguished. *M'Cann, Tenant; Marquis of Downshire, Landlord* - App. 611

TRAMWAY—*Baronial guarantee—Amount to be paid by the baronies—Award of Arbitrators—Certificate—Working Expenses*—46 & 47 *Vict. c.* 43, *s.* 6.] On an application for a writ of *certiorari* to bring up a certificate of arbitrators appointed under sect. 9 of the Tramways and Public Companies (Ireland) Act, 1883, finding that a sum should be contributed by the baronies to make up a deficiency in the guaranteed dividends, for the purpose of having such certificate quashed, the applicant showed that portion of the sum found by the arbitrators to be the working expenses consisted of sums which the applicant alleged represented interest or annual payments in respect of matters which the applicant contended should have been provided out of capital of the Company: —*Held*, in the Queen's Bench Division by Johnson, Gibson, and Madden, JJ. (*diss.* O'Brien, J.) and by the Court of Appeal, that the question whether these payments were working expenses was one of the matters over which, by the Act of Parliament, jurisdiction was conferred upon the arbitrators to decide, and that their certificate in that respect was binding. *Reg.* (*West Clare Railway Company* (*Limited*)) v. *Secretary of Grand Jury for the County of Clare* - - - - - - Q. B. 691

—— Working expenses—Damages for negligence
See Working Expenses. [115

TRESPASS IN PURSUIT OF GAME—*Summary jurisdiction—Preservation of Game Act* (27 *Geo.* 3, *Ir.*, *c.* 35), *sect.* 10—*Evidence.*] Upon the hearing of a complaint, under 27 Geo. 3 (Ir.), c. 35, for unauthorized trespass in pursuit of game, it is not enough, to entitle a defendant to a dismiss, that it is not proved that he was actually seen pursuing or destroying game, or attempting to do so, if other evidence sufficiently lead to the inference that the offence was committed. *Marquis of Headfort, Appellant; Farrelly, Respondent* [Q. B. 12

TRIVIALITY—Subletting—Land Law (Ireland) Act, 1887, s. 4 - 573, 637
See Bona Fide Occupation. 1.
Subletting.

TRUSTEE—Executor not proving will - 1
See Limitations, Statute of.

ULTRA VIRES—Harbour Commissioners—By-law - - - - - - 384
See By-law.

VENDOR AND PURCHASER—*Conditions of sale—Particulars—Agreement—Name of vendor.*] An agreement for sale of leasehold property annexed to the descriptive particulars and conditions of sale acknowledged the purchase of the premises described in the particulars, and contracted for completion subject to the conditions. The particulars identified the leases by dates, terms, and reserved rents; and one of the conditions described the vendor as executrix of the assignee of the lessee, but the vendor's name did not otherwise expressly, or by reference, appear in the agreement. In an action involving the validity of the agreement, the objection that the vendor's name did not appear in it was not made at the trial, in which a verdict and judgment was entered for the plaintiff:—*Held*, that the leases, the assignment and will of the vendor's testator might have been given in evidence to displace the objection if taken at the trial; and that it was too late to raise the point upon a motion to enter the verdict and judgment for the defendant. *Hodgens* v. *Keon* [Ex. 657; App. 662

—— Sale by sheriff—Want of title - 61, 648
See Sheriff.

WAIVER—Condition—Contract - - 663
See Conditional Contract.

WARRANT—Distress or in default imprisonment—Non-payment of penalty—Licensing Act, 1872, ss. 3, 51 - - 363
See Penalty.

WILL—Devise—Registration of Title Act 381
See Parliament. 14.

—— Executor in possession without proving 1
See Limitations, Statute of.

WORDS—"Adjustment of loss"—Policy of insurance against fire - - 723
See Arbitration.

—— "Application"—50 & 57 Vict. c. 33, s. 1
See Present Tenant. [480

—— "Expenses"—46 & 47 Vict. c. 43, s. 4
See Working Expenses. [115

—— "Failure of justice"—53 & 54 Vict. c. 70, Sched. II., Art. 26 - - - 181
See Compulsory Purchase.

—— "Fee-farm grant"—54 & 55 Vict. c. 57, s. 1 - - - - - - 224
See Redemption of Rent.

—— "House or shop"—3 & 4 Vict. c. 108, s. 30 - - - - - - 346
See Municipal Borough.

—— "Person aggrieved"—34 & 35 Vict. c. 109, s. 12 - - - - - - 489
See Municipal Expenditure.

WORDS—*continued.*
—— "Suitability of premises"—37 & 38 Vict. c. 69, s. 9 - - - - - 246
See LICENSING ACTS.
—— "Town"—44 & 45 Vict. c. 49, s. 58, sub-s. 2 - - - - - 473
See TOWN-PARK. 1.
—— "Trivial"—50 & 51 Vict. c. 33, s. 4 637
See SUBLETTING.

WORKING EXPENSES — *Tramways and Public Companies (Ireland) Act*, 1883—*Baronial guarantee*—"*Expenses of working and management*"—*Damages recovered against a guaranteed Railway Company for negligence.*] Expenses of working and management (within section 4 of the Tramways, Ireland, Act, 1883) include damages recovered against a Railway Company for injuries arising from negligence or default in the conduct of the business of the Company. *Reg.* v. *Treasurer, Co. Cork* (24 L. R. Ir. 415) approved and followed. *In re Tralee and Dingle Light Railway Co.* [Q. B. 115

WORKING EXPENSES—*continued.*
—— Arbitrators' certificate—Finality - 691
See TRAMWAY.

WRIT OF SUMMONS—Excessive claim for costs—Setting aside - - - 682
See COSTS. 1.
—— Special indorsement - - - - 16, 18
See SPECIALLY INDORSED WRIT. 1, 2.

YEARLY TENANCY
See TENANCY FROM YEAR TO YEAR.

THE END.